

DAILY READING FILE



ALAN WILSON
ATTORNEY GENERAL

March 29, 2011

Hon. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
EPA Headquarters – Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, D.C. 20460

Dear Ms. Jackson:

As state Attorneys General, we are writing to ask the EPA to defer its program of greenhouse gas (GHG) regulations so that Congress can be given an opportunity to evaluate both the need and timing of such regulations. Such deferral is especially important to us given the disruption that the rapid implementation of the EPA program is causing to the state administrative agencies that we advise and the businesses those agencies have been tasked with regulating.

As you know, litigation is now underway challenging various aspects of the GHG regulations, as well as the Endangerment Finding on which those regulations are based; however, our purpose in writing you is *not* to debate those particular issues. Indeed, those are issues on which all of us are not necessarily agreed. Instead, our purpose today is to ask that you exercise the discretion recognized by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), with respect to the timing of your regulations by deferring the GHG regulatory program.

Such a deferral would have at least three major advantages:

1. A deferral would allow the current Congress a full opportunity to review the EPA's Endangerment Finding and to determine the best course for our nation to take. The Clean Air Act, under which the EPA has adopted its regulations, is not an effective or efficient vehicle to deal with an issue like the worldwide emissions of GHG's, and the issue calls for full debate by our elected representatives.

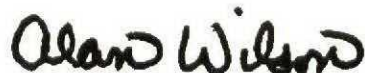
2. A deferral would relieve the pressure on state agencies scrambling to implement new regulatory requirements in the face of the drastic consequences that your agency has announced it could impose if such implementation is not put in place immediately. As you know, those consequences could include subjecting States to a construction ban and requiring a multitude of relatively small CO₂ emitters – including some houses of worship, hospitals, big box stores, apartment buildings and hotels – to comply with complicated emission and permitting requirements. The EPA has characterized such sweeping application of GHG regulation as an “absurd result” that should be avoided, and we agree.

3. Whatever may be the long term merit of your agency’s regulatory approach – an issue on which we may disagree, even among ourselves – there can be no doubt that the immediate consequences will be to make economic recovery more difficult. Deferral would help facilitate such recovery, and it would allow time for a study of the long term impact of GHG regulations on jobs and the economy.

As shown by EPA’s own documents, the United States contributes a decreasing fraction of the GHG emissions in the world today,¹ and the total amount of six common pollutants emitted in our country has actually decreased over the last 30 years.² Thus, it may be fairly inferred, even from your own documents, that the deferral we request would not have any significant deleterious effect on the global climate.

For these reasons, we respectfully request that your agency defer its GHG regulatory program for at least three years.

Sincerely,



Alan Wilson

Attorney General

[Signatures continue next page]

¹ For example, in 1990, the United States produced approximately 6,000 million metric tons of GHG emissions, compared to a world total of approximately 31,000 million metric tons. By 2005, the GHG emissions in the United States had risen to approximately 7,000 million metric tons, whereas the world total in 1990 had swelled to 38,000 million metric tons. Thus, only about 1/7 of the recent increase in worldwide GHG emissions is attributable to the United States. *Source:* <http://www.epa.gov/climatechange/indicators/pdfs/CI-greenhouse-gases.pdf>.

² Between 1970 and 2008, the United States’ population increased by 48 percent, coal-fueled electricity increased by 184 percent and gross domestic product increased by 209 percent; however, non-CO₂ emissions *decreased* by 60 percent. *Source:* www.epa.gov/airtrends/images/comparison70.jpg, www.epa.gov/air/emissions and www.eia.doe.gov/emeu/aer/pdf/pages/sec8_17.pdf



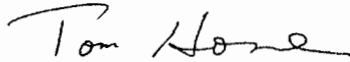
Luther Strange
Attorney General
State of Alabama



John J. Burns
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State of Alaska



Dustin McDaniel
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Tom Horne
Attorney General
State of Arizona




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State of Kansas



James D. "Buddy" Caldwell
Attorney General
State of Louisiana



Bill Schuette
Attorney General
State of Michigan



Jon C. Bruning
Attorney General
State of Nebraska



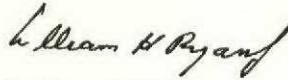
Wayne Stenehjem
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Michael DeWine
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State of Ohio



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Attorney General
State of Oklahoma



William H. Ryan, Jr.
Acting Attorney General
State of Pennsylvania



Marty J. Jackley
Attorney General
State of South Dakota



Greg Abbott
Attorney General
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Mark L. Shurtleff
Attorney General
State of Utah



Ken Cuccinelli
Attorney General
State of Virginia



Gregory A. Phillips
Attorney General
State of Wyoming

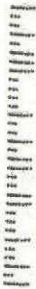


Pam Bondi
Attorney General
State of Florida



ALAN WILSON
ATTORNEY GENERAL

Hon. Lisa P. Jackson
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U.S. Environmental Protection Agency
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Mail Code: 1101A
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Office of the Attorney General

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JON BRUNING
ATTORNEY GENERAL

June 18, 2013

Via Certified Mail & Email

Acting Administrator Bob Perciasepe
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460
perciasepe.bob@epa.gov

Re: New Source Performance Standards for Greenhouse Gases

Acting Administrator Perciasepe:

We are writing in response to the Notices of Intent to sue filed with the United States Environmental Protection Agency on April 15 and 17, 2013. These notices allege a failure by EPA to perform its non-discretionary duties of promulgating standards of performance for greenhouse gas emissions from new electric generating units (EGUs) and issuing emission guidelines for existing units.

The signatory parties to the notices indicate they "are willing to explore any effective means of resolving this matter without the need for litigation." As discussed below, there is no legal merit in the notices' Clean Air Act (CAA) § 304 allegations. Accordingly, the undersigned Attorneys General request that EPA decline to enter into any form of settlement negotiations to resolve the concerns of the petitioners. Air quality is of equal concern to all States. Appropriate process should not be subjugated, and effective policymaking cannot be forced to fruition, by threatening litigation.

In the event EPA deems it necessary and appropriate to allow the petitioners to commandeer the policymaking process under the threat of litigation, we request notice and an opportunity to participate in the resolution of the notices.

EPA Did Not Fail To Perform, or Unreasonably Delay, a Non-Discretionary Duty

The notices allege EPA failed to perform the non-discretionary duty of finalizing standards of performance for greenhouse gas emissions from new EGUs. That claim is incorrect.

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Under CAA § 304, a district court may only compel “unreasonably delayed” action if that action is non-discretionary. The CAA makes clear that EPA must review the standards of performance for a listed source category at least every eight years, but is only required to revise such standards “if appropriate”. CAA § 111(b). In 2006, EPA revised the standards of performance applicable to new EGUs. These revisions were challenged by petitioners in *New York v. EPA* (D.C. Cir. No. 06-1322). The revisions, which lacked performance standards for GHG emissions, were remanded to EPA in light of the Supreme Court’s holding that various GHGs constitute “air pollutants” in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

Following the *Massachusetts* decision, EPA conducted another review of the standard of performance for new EGUs and proposed standards for GHG emissions. 77 Fed. Reg. 22,392 (April 13, 2012). Although EPA has yet to finalize these standards, actual revision of the standards is discretionary under CAA § 111(b), and occurs only “if appropriate”. Because the review has been conducted in a timely fashion and revisions are discretionary, suit is inappropriate under CAA § 304 for failure to perform a non-discretionary duty.

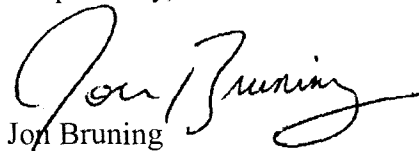
Likewise, because the issuance of emission guidelines is self-imposed by EPA regulation and not a non-discretionary duty under the CAA, § 304 is inapplicable to these claims. In any event, EPA’s guideline publication regulations do not impose a specific timeframe for issuance of emissions guidelines. Indeed, they vest EPA with discretion to issue emission guidelines “upon or after promulgation of standards of performance.” 40 C.F.R. § 60.22(a). Thus, were a duty to exist “under the CAA” it could not be deemed non-discretionary.

The CAA provides the States, rather than EPA, with responsibility for developing the standards of performance for existing sources under § 111(d). The only statutorily-imposed duty for EPA is to develop a process for States to submit plans for regulating existing sources; and this duty only arises when a standard of performance for new sources is found to be applicable. Accordingly, petitioners’ § 304 allegations concerning EPA’s failure to issue emission guidelines for existing sources also lack merit.

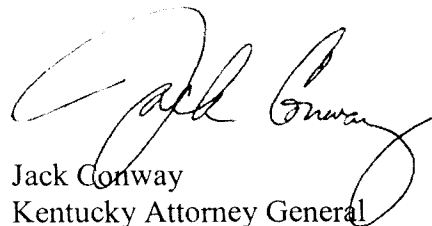
Conclusion

As the foregoing discussion establishes, EPA did not have a non-discretionary duty to take the actions petitioners’ notices request. We therefore request that EPA refrain from allowing petitioners to unduly influence the policymaking process via settlement negotiations. However, if EPA feels compelled to engage in such negotiations, we request notice and an opportunity to be involved in the resolution of the notices.

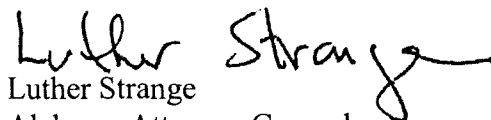
Respectfully,

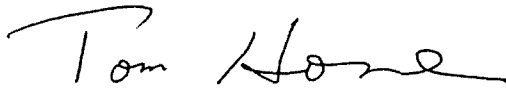


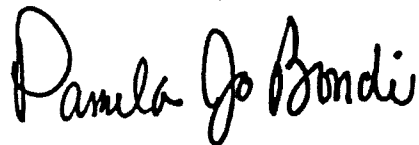
Jon Bruning
Nebraska Attorney General





Jack Conway
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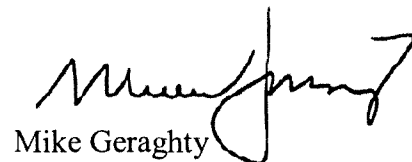

Pamela Bondi
Florida Attorney General

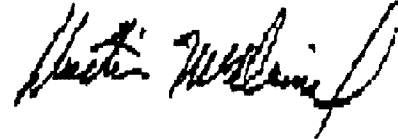

Greg Zoeller
Indiana Attorney General

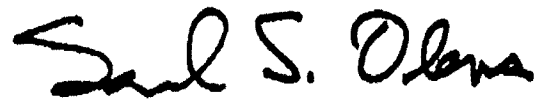

Bill Schuette
Michigan Attorney General



Wayne Stenehjem
North Dakota Attorney General

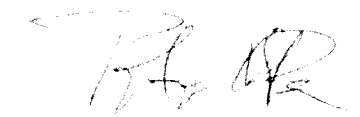

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Oklahoma Attorney General



Mike Geraghty
Alaska Attorney General

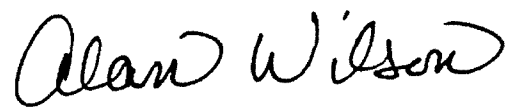

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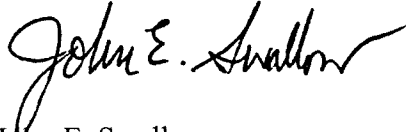

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Acting Administrator Bob Perciasepe
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

20460



Fri Mar 07 11:52:43 EST 2014
Postell-Glover.Eliska@epamail.epa.gov
FW: Comments on Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells
To: CMS.OEX@epamail.epa.gov

Eliska Postell-Glover

Office of Executive Secretariat

postell-glover.eliska@epa.gov

Room 2336 WJC-North

202.564.6967

From: Clayton.Eubanks@oag.ok.gov [mailto:Clayton.Eubanks@oag.ok.gov]
Sent: Friday, February 28, 2014 3:51 PM
To: Mccarthy, Gina; GSRuleGuidanceComments
Subject: Comments on Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells

Dear Administrator McCarthy,

Attached please find a comment letter from the Attorneys General of the states of Oklahoma, Alabama, Michigan, Nebraska, South Carolina, Texas and Wyoming regarding the Draft UIC Program Guidance on Transitioning Class II wells to Class VI wells. Thank you for the opportunity to submit these comments and we look forward to your response to the States concerns as outlined in the letter.

Sincerely,

P. Clayton Eubanks
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E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

February 28, 2014

VIA CERTIFIED MAIL & E-MAIL

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Email: mccarthy.gina@epa.gov

U.S. Environmental Protection Agency
GS Rule Guidance Comments
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460
Email: GSRuleGuidanceComments@epa.gov

**Re: Draft Underground Injection Control (UIC) Program Guidance on
Transitioning Class II Wells to Class VI Wells**

**Comments from the Attorneys General of the States of Oklahoma, Alabama,
Michigan, Nebraska, South Carolina, Texas and Wyoming**

Dear Administrator McCarthy:

We are writing to express our concern over the Environmental Protection Agency's (EPA) Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells (Draft Guidance), issued in December 2013. The Draft Guidance proceeds from an inaccurate understanding of the authority of a Class VI regulator with respect to Class II wells and therefore unlawfully interferes with the authority granted to States under the UIC Program. We respectfully request that EPA resolve this fundamental flaw to protect vital sectors of our economy and preserve the well-being of the citizens and businesses of our States.

The Safe Drinking Water Act's (SDWA) UIC Program is intended to protect subsurface supplies of drinking water from the drilling and use of underground wells for various industrial activities. Under this program, oil and gas wells are classified as "Class II" wells, and, pursuant to the structure of the UIC Program and primacy agreements with EPA, our states – and not EPA



– serve as the primary regulators of Class II wells. Recently, EPA created a new class of wells under the UIC Program, known as “Class VI” wells, for the underground injection and storage of carbon dioxide (CO₂), primarily in connection with prospective carbon capture and storage (CCS) operations. *See* 75 Fed. Reg. 77230 *et seq.* (Dec. 1, 2010). *See also* 75 Fed. Reg. 75060 (Dec. 1, 2010).

Notwithstanding this new class of wells intended to accommodate the underground injection of CO₂, many oil and gas producers operating Class II wells have been injecting CO₂ for the past 40 years to manipulate well pressure and enhance the recovery of oil and gas. This process, commonly referred to as enhanced oil recovery (EOR), has been used in more than 10,000 wells, about 7,000 of which are currently active. EOR represents a critically important part of our states’ and our country’s energy infrastructure and plays an essential role in our nation’s economic stability and energy security.

The Draft Guidance, arising from EPA’s newly-created Class VI wells, is directed at the interplay between Class II and Class VI wells as it relates to underground CO₂ injection. But rather than provide clarity and avoid interfering with the production of oil and gas via EOR – which, again, we emphasize has been occurring for the past several decades without increased risk to drinking water and other subsurface assets – the Draft Guidance has introduced confusion and uncertainty into the oil and gas industry and failed to resolve the business community’s outstanding issues with the UIC Program.

Specifically, the Draft Guidance indicates that a regulator in an EPA regional office overseeing Class VI wells (*i.e.*, the Class VI Director) has the authority to determine whether a Class II well at which EOR operations are occurring must “transition” to a Class VI well. This flies in the face of prevailing industry practice, as well as common sense. It also violates current law and the proper division of authority between EPA and states under SDWA.

As part of its rulemaking in 2010 creating the Class VI well category, EPA articulated a series of factors by which a Class II well with EOR operations could be reclassified a Class VI well, presumably to perform CCS-type operations instead. 40 C.F.R. § 144.19. This included such criteria as an increase in reservoir pressure within the injection zone, an increase in CO₂ injection rates, suitability of the Class II area of review delineation, the owner’s or operator’s plan for recovery of CO₂ at the cessation of injection, the source and properties of injected CO₂, and any additional site specific factors as determined by the regulator. *Id.* Many Class II permit holders communicated to EPA that these criteria were too vague and could lead to the reclassification of wells in which CCS was neither intended nor actually occurring. In response, EPA prepared and issued the Draft Guidance in December 2013.

The Draft Guidance correctly states that while CO₂ is stored underground during EOR operations in a Class II well, this alone does not require the transition of the Class II well into a Class VI well. To the contrary, EPA has plainly stated that EOR operations at a Class II well are not to be affected by the Class VI rule:

Traditional ER projects are not impacted by this rulemaking and will continue operating under Class II permitting requirements. EPA recognizes that there may be some CO₂ trapped in the subsurface at these operations; however, if there is no increased risk to [underground sources of drinking water (USDW)], then these operations would continue to be permitted under Class II.

75 Fed. Reg., at 77245. The Draft Guidance properly reiterates this point, stating “[t]raditional EOR projects are not affected by the Class VI rulemaking and will continue to be permitted under Class II requirements.” Draft Guidance, at 1.

But then the Draft Guidance goes on to describe scenarios in which a Class II well with EOR operations would need to be reclassified as a Class VI well, based on the unchecked increase in subsurface pressures caused by the injection of CO₂. This is blatantly inconsistent with prevailing practices in the oil and gas industry and contrary to law.

Under the UIC Program, our states are vested with authority to permit Class II wells with EOR for purposes of enabling the production of oil. As part of this, the state-level Class II Director reviews maximum and average injection pressures and other information to ensure that CO₂ injection will “not result in the movement of fluids into a USDW so as to create a significant health risk.” Draft Guidance, at A-4-A-5. Class II regulations specify limits on injection pressures to prevent the movement of injection or formation fluids into a USDW or the fracturing of the confining zone. *Id.* at A-8. *See also* 40 C.F.R. § 146.23(a). The Class II framework is thus wholly competent to prevent unchecked increases in subsurface pressures during EOR operations and other traditional oil and gas production methods. The scenario described by EPA as a trigger for reclassification simply is not reflective of real world operating conditions.

The actual circumstance under which reclassification would occur, also described in the Draft Guidance, is where a Class II operator changes the primary purpose of the well from the production of oil to the maximal underground storage of CO₂ and, in so doing, changes its operations in such a way as to transcend the confines of the Class II regulatory structure and create an “increased risk to USDWs compared to traditional Class II operations using carbon dioxide.” Draft Guidance, at ii. Importantly, this is not so easily done. A Class II permit holder cannot change from EOR to maximal CO₂ storage without accounting for numerous other interests and legal and business considerations. For example, its contractual obligations with land owners and/or subsurface rights holders would most likely need to be altered, if not renegotiated, to accommodate such a transition. Similarly, state laws intended to enable oil and gas production can, in certain circumstances, interfere or even prohibit the use of oil and gas wells for maximal CO₂ storage if future production would be inhibited.

But regardless, the Draft Guidance further complicates and confuses the situation by erroneously implying that the Class VI Director can, on his or her own volition, preempt the Class II Director and require the Class II permit holder to file for reclassification under Class VI. This is not lawful. Allowing the Class VI Director to “second guess” the Class II Director and intervene seemingly on a whim violates EPA’s own rules regarding state primacy and flagrantly impinges upon state authority. EPA cannot revoke a state’s primacy unless it can show a failure to comply with applicable requirements. 40 C.F.R. § 145.34(b). These requirements prescribe a series of detailed steps EPA must follow in order to do so, including providing adequate notice to the state and allowing the state sufficient time to take corrective action.

Thus the Draft Guidance, in overtly implying that the Class VI Director is empowered to act unilaterally within an industry in which he or she lacks requisite experience – thereby exposing a Class II permit holder to the seemingly unbounded risk of being ordered, absent any

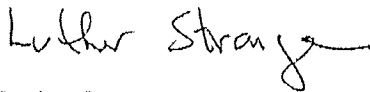
specific criteria, to apply for reclassification – is utterly and entirely beyond the bounds of EPA authority and carries the very real possibility of doing harm to our nation's energy infrastructure. Moving beyond the confines of a traditional Class II well with EOR operations to maximal CO₂ storage is not easily nor quickly done and implicates significant economic and other business considerations. Allowing the Class VI Regulator to intervene seemingly without basis adds an unconscionable level of uncertainty and risk to a mature area of industrial activity already well and thoroughly regulated.

For the foregoing reasons, we respectfully request you take immediate action to rectify this situation as the Draft Guidance is finalized and, additionally, through any other rulemakings as may be necessary under the UIC Program to eliminate this uncertainty and ensure strict adherence to applicable law.

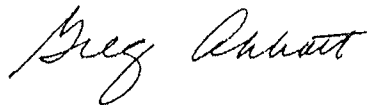
Sincerely,



E. Scott Pruitt
Oklahoma Attorney General



Luther Strange
Alabama Attorney General



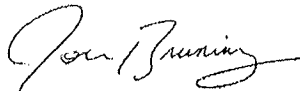
Greg Abbott
Texas Attorney General



Bill Schuette
Michigan Attorney General



Peter Michael
Wyoming Attorney General



Jon Bruning
Nebraska Attorney General



Alan Wilson
South Carolina Attorney General

Fri Nov 14 12:40:21 EST 2014
Postell-Glover.Eliska@epamail.epa.gov
FW: Docket ID No. EPA-HQ-OW-2011-0880 -- Proposed Definition of "Waters of the United States" under the Clean Water Act
To: CMS.OEX@epamail.epa.gov

From: Hart, Nancy (AG) [mailto:HartN1@michigan.gov]
Sent: Friday, November 14, 2014 12:18 PM
To: OW-Docket; joellen.darcy@us.army.mil; Mccarthy, Gina
Cc: Clover Adams, Jamie (MDA); Creagh, Keith (DNR); Brader, Valerie (GOV); Sygo, Jim (DEQ); Datema, Maggie (DEQ); Creal, William (DEQ); Fish, Kim (DEQ); Smith, Laura (DEQ); Thelen, Mary Beth (DEQ); Shaler, Karen (DEQ); Tkaczyk, Judy (DNR); Smith, Brenda (MDA); West, Samantha (GOV); Feuerstein, Heather (DEQ); Isaacs, Carol (AG); Schneider, Matthew (AG); Manning, Peter (AG); Hills, Rusty (AG); Gay, Lori (AG); Teszlewicz, Barbara (AG); Gustafson, Holly (AG)
Subject: Docket ID No. EPA-HQ-OW-2011-0880 -- Proposed Definition of "Waters of the United States" under the Clean Water Act

Attached please find Michigan Attorney General Bill Schuette’s letter for Docket ID No. EPA-HQ-OW-2011-0880 -- Proposed Definition of "Waters of the United States" under the Clean Water Act.

Nancy E. Hart

Division Head Secretary

Environment, Natural Resources,

and Agriculture Division

525 W. Ottawa Street

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Lansing, MI 48909

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BILL SCHUETTE
ATTORNEY GENERAL
STATE OF MICHIGAN

November 14, 2014

Ms. Gina McCarthy
U.S. Environmental Protection Agency
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1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary of Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310-0108

Water Docket
U.S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2011-0880 – Proposed definition of
“Waters of the United States” under the Clean Water Act

Dear Ms. McCarthy and Ms. Darcy:

I appreciate the opportunity to comment on EPA’s proposed rule defining “Waters of the United States” for purposes of the Clean Water Act. I believe I offer a unique perspective as Attorney General for the State Michigan, one of only two states to administer the Clean Water Act § 404 (wetland) program, and as a former director of our State’s agriculture department, who understands the importance of Michigan’s second largest economic driver, agriculture.

My comments echo the August 22, 2014 comments submitted by Dan Wyant, Director of the Michigan Department of Environmental Quality, and the September 30, 2014 comments submitted by Michigan Farm Bureau. The overarching theme of those comments is that the proposed rule does the opposite of its stated intent. Instead of clarifying the federal government’s reach under the Clean Water Act, within the parameters set by the Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* 531 U.S. 159 (2001); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the proposed rule sows confusion and uncertainty, and could be read to expand your agencies’ authority beyond the limits set by Congress and the Supreme Court. This not only potentially complicates EPA’s ongoing review of Michigan’s § 404 wetland program, but has created significant apprehension within

Michigan's agricultural community that the rule could be used to expand federal regulation over resources and activities traditionally left to the states.

Michigan's Protection of its Water Resources

As Director Wyant emphasized in his comment letter, Michigan has administered a state wetlands program under § 404 of the Clean Water Act for over three decades. Michigan's statutory framework for protecting wetlands, and all other waters of the State, provides comprehensive protection for its water resources, as well as clear jurisdictional lines. Michigan has separate statutes regulating:

- Wetlands (Part 303, Wetland Protection, of the Natural Resources and Environmental Protection Act (NREPA), Mich. Comp. Laws § 324.30301 *et seq*);
- Inland lakes and streams (Part 301, Inland Lakes and Streams, of the NREPA, Mich. Comp. Laws § 324.30101 *et seq*);
- The Great Lakes and their bottomlands (Part 325, Great Lakes Submerged Lands, of the NREPA, Mich. Comp. Laws § 324.32501 *et seq*); and
- All waters of the State, including groundwater, from "any waste material or other polluting substance" (Part 31, Water Resources Protection, of the NREPA, Mich. Comp. Laws § 324.3101 *et seq*).

And these are only four of the over two dozen state statutes that are directed to protecting Michigan's waters, including its wetlands. That Michigan deeply cares about its water resources should come as no surprise given that its geographic boundaries are literally defined by the Great Lakes.

While no environmental program can be implemented without some challenges and other controversies, Michigan's § 404 program has largely been viewed as a success by your agencies, the State, and those subject to regulation. This is in large part due to the relative certainty regarding the scope of Michigan's regulations over different types of waters and activities in those waters. Where possible, these statutes and their rules define regulated resources by objective criteria, e.g., minimum acreage (lakes or ponds), physically identifiable characteristics (bed and banks, and ordinary high water marks for lakes and streams), and distances from other water bodies (contiguous wetlands). In addition, Michigan has placed statutory time limits on processing permits (see, e.g., Mich. Comp. Laws § 324.30307, requiring approval or disapproval of a wetland permit application within 90 days). Thus, Michigan's wetlands program provides protection to its water resources while giving those requiring permits – farmers, businesses, home builders, and individual landowners – regulatory certainty and timely decisions.

Director Wyant's letter references EPA's decade-long review of Michigan's § 404 program, and Michigan's commitment to making certain changes in state law that EPA deemed necessary for the State to continue implementing the program. Director Wyant's letter outlines the process Michigan undertook, which included creation of a Wetland Advisory Council comprised of numerous stakeholders – business groups, homebuilders, agriculture interests, drain commissioners, and conservation and environmental groups. The legislation that resulted from this collaborative effort, 2013 PA 98, is intended to address EPA's requirements, while continuing to provide a balance between protecting Michigan's water resources and allowing reasonable land and water use in the State.

Michigan has been a leader in protecting its water resources, including wetlands, and for decades has been one of only two states to implement both the § 402 (point source) and § 404 Clean Water Act programs. State primacy and innovation in the management of their land and water resources is exactly what Congress intended when it enacted the Clean Water Act:

It is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b); emphasis added.

In contrast to the regulatory certainty provided by Michigan's wetland program for the last 30 years, the proposed new rule defining "Waters of the United States" threatens to create confusion and uncertainty.

Problems with the Proposed Rule

The stated scientific underpinning for the proposed rule is a *draft* report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." As indicated by the title, the intent of this report is to review and summarize the scientific literature evaluating the level of chemical, physical, and biological connection between smaller water bodies, including wetlands, with the larger bodies of water that no one disputes are subject to federal jurisdiction, i.e., traditionally navigable waters, interstate waters, and the territorial seas (hereinafter referred to as "core waters.")

As acknowledged in the Federal Register notice for the proposed rule, your agencies intend the proposed rule to meet the standard articulated by Justice Kennedy in *Rapanos v. United States*. 79 Fed. Reg. 22,188 (April 21, 2014). Justice Kennedy held that only wetlands with a “significant nexus” to core waters could be regulated under the Clean Water Act. In other words, in order to be subject to Clean Water Act jurisdiction, wetlands must “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Rapanos*, 547 U.S. at 780. Your agencies rely on the draft report to justify their determination that a per se significant nexus exists between core waters and all “tributaries” and “adjacent waters” as defined in the proposed rule. These defined terms then include other defined terms (e.g., “neighboring,” “riparian area,” and “floodplain”) that read together would result in vast numbers of small water bodies, on huge areas of land, falling under federal Clean Water Act jurisdiction.

In their comment letters, both DEQ Director Wyant and the Michigan Farm Bureau encouraged the agencies not to move forward with the proposed rule when the ostensible scientific foundation for the proposed rule was still in draft form and had not been reviewed by EPA’s Science Advisory Board. These comments proved prescient. After their comments had been submitted, on October 17, 2014, the Science Advisory Board informed EPA that it “recommends *revisions to improve the clarity of the Report, better reflect the scientific evidence, expand discussion of approaches to quantifying connectivity, and make the document more useful to decision-makers.*” (Emphasis added.) The Science Advisory Board then went on to outline ten specific areas where it recommended substantive changes to the draft report.

Your agencies should not have moved forward with a proposed rule that lacks a completed scientific analysis, particularly given that the draft report is the linchpin for major assumptions that are used to justify the proposed rule. While the Science Advisory Board accepted certain conclusions in the draft report, it seems very likely the draft report, and potentially the proposed rule itself, will undergo substantial changes before the final rule is issued. But the public and other interested parties will not have any meaningful opportunity to review and comment on the revised report, or a potentially revised rule. That is unacceptable for a rule of this scope and national significance. EPA and the Corps should either extend the current comment period or restart the public notice and comment process when they have all of the proposed rule’s components finalized. To do otherwise undermines public confidence in the process and ultimately the legitimacy of the rule.

Moreover, as detailed in Michigan Farm Bureau’s comments, the proposed rule, as it stands, is arguably not consistent with the Supreme Court’s decisions in *Rapanos*, *SWANCC*, and *Bayside Riverview*, and is not clearly supported by the science relied on in the draft report. As noted above, the proposed rule includes

several new definitions, including definitions for “tributary” and “adjacent.” The latter term then includes an additional defined term “neighboring,” which then includes two additional defined terms, “riparian area” and “floodplain.” As highlighted by Farm Bureau, the net effect of this chain of new defined terms is a potentially expansive increase in federal jurisdiction under the Clean Water Act.

For example, the proposed definition of “tributary” includes the following language: “wetlands, lakes and ponds are tributaries (*even if they lack a bed, banks, or ordinary high water mark*) if they contribute flow [to a core water].” (Emphasis added.) This is contrary to the common understanding of a tributary, which is an identifiable water course that connects to a larger stream, river, or other water body. This is reflected in Michigan law, which for decades has described the streams, lakes, or ponds that may be tributaries to larger bodies of water as a “body of water that has *definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water. . .*” Part 301 of the NREPA, Mich. Comp. Laws § 324.30101(i) (defining “[i]nland lake or stream”) (emphasis added).

Under the proposed rule, all tributaries are categorically determined to have a significant nexus to core waters, and are “Water of the United States” subject to federal jurisdiction. But it is far from clear that there is a legal or scientific justification for categorical federal regulation of an area as a tributary when it does not have any visible evidence that water remains in the area for any period of time. Further, it is unclear what it means for an area to “contribute flow” to a core water. If any amount of water flows over an area, and some of that water ultimately reaches a core water, does that “contribute flow”? Is that sufficient to create a per se significant nexus with core waters? And how is a farmer or other landowner to know that they have an area that “contributes flow” to a core water when it has no physical indicators of that water? I concur with Michigan Farm Bureau that none of these questions have been adequately answered.

Perhaps more confounding is the chain of newly defined terms that brings all waters in “riparian area[s]” or “floodplain[s]” under categorical federal jurisdiction. Waters “adjacent” to core waters and tributaries (which, as discussed above, are expansively defined) are also deemed by fiat to have a “significant nexus” to core waters and, therefore, be regulated under the Clean Water Act. These adjacent waters include “neighboring” waters, which are defined to include waters within a “riparian area” or “floodplain.” Michigan Farm Bureau points out that the latter two terms are “so vague and all-encompassing” that a variety of small waters in these potentially huge areas could be pulled under federal jurisdiction without any actual basis in fact that they have a significant nexus with core waters.

Finally, Michigan Farm Bureau identifies the open-ended and potentially vast “catch-all” provision that allows EPA and the Corps to determine that a water body not already captured as a tributary or adjacent water, nonetheless still has a

significant nexus with core waters. Of particular concern to Farm Bureau is that these case-specific determinations can be based on aggregating water bodies “in the same region” to find that because the whole may have a significant nexus, each individual water is also deemed to have a significant nexus. Farm Bureau questions the scientific basis for such an aggregation, and it is equally unclear under what legal authority your agencies can determine that an individual landowner is regulated under the Clean Water Act based on the determination that his property is part of a “collective nexus” with an otherwise regulated water.

Conclusion

Michigan has comprehensive and effective programs in place to protect its water resources, including its wetlands. For the past 30 years Michigan has assumed the lead in preventing water pollution and controlling land and water development within its own borders, as Congress intended. It has done so through statutes that provide a high level of regulatory certainty. And it has done so in partnership with EPA and the Corps.

The proposed rule defining “Waters of the United States” potentially impacts the stability of Michigan’s wetland program because of the uncertainty created by the proposed rule. This uncertainty is partially driven by the failure of your agencies to finalize the connectivity report, which was to serve as the scientific basis for the proposed rule. It is likely the draft report will be changed based on the comments of the Science Advisory Board, and this potentially will lead to changes in the proposed rule. There will be no ability for the public or other stakeholders to review and comment on those changes. This leads to a loss of confidence in the process and the legitimacy of the end result.

Moreover, there are legitimate concerns – whether intended or not – that the proposed rule will be used to expand federal jurisdiction beyond the limits set by the Supreme Court. This has the potential to further complicate EPA’s review of Michigan’s § 404 program, with the specter that EPA may seek additional changes to Michigan’s program; changes we believe are unnecessary to protect our water resources.

But more importantly for Michigan citizens, it creates the potential for an expansion of federal jurisdiction whether that is implemented by DEQ under its assumed authority, or by EPA and the Corps in those areas of the State (traditionally navigable waters) where your agencies still implement the Clean Water Act. Michigan Farm Bureau is just one important stakeholder that has identified potential legal and scientific flaws in the proposed rule that would allow jurisdiction to expand well beyond what Congress intended or was historically exercised by your agencies. Even if this was not the intended result, the proposed rule, the 89 single-spaced pages of explanation in the Federal Register, and 331

pages of the draft connectivity report are almost impenetrable to the average citizen. Unlike air emission rules or other environmental laws that only apply to businesses or other entities in highly regulated areas, the proposed rule potentially impacts every citizen, including homeowners and family farmers who do not have the technical expertise or means to navigate a complicated federal regulation.

In sum, I believe the agencies should consider regrouping, finalizing all of the components of the proposed rule, and starting over. At a minimum, the comment period should be extended until all of the component parts are finalized.

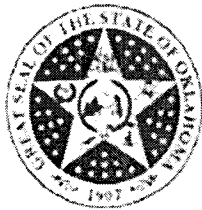
Sincerely,

A handwritten signature in black ink, reading "Bill Schuette". The signature is written in a cursive, flowing style with a long horizontal line extending from the end.

Bill Schuette
Attorney General
State of Michigan

WDS/SPM:neh

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA



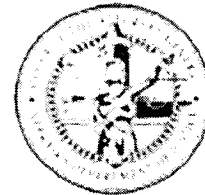
E. SCOTT FRUITT
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA



PATRICK MORRISSEY
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF NEBRASKA



JON BRUNING
ATTORNEY GENERAL

Comment from the Attorneys General of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units¹

Docket ID No. EPA-HQ-OAR-2013-0602
submitted at regulations.gov
and via email to: A-and-R-Docket@epa.gov

On June 18, 2014, EPA proposed emission guidelines for carbon dioxide emissions from existing fossil fuel-fired power plants, invoking its authority under Section 111(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(d). *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (hereinafter "Proposal"). EPA's proposal attempts to use the Clean Air Act to override states' energy policies and impose a national energy and resource-planning policy that picks winners and losers based solely on EPA's policy choices, forcing states to favor renewable energy sources and demand-reduction measures over fossil fuel-fired electric production. But the Clean Air Act generally and Section 111(d) specifically do not give EPA that breathtakingly broad authority to reorganize states' economies. "Congress . . . does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Congress did not hide the authority to impose a national energy policy in the "mousehole" of this obscure, little-used provision of the Clean Air Act, which EPA has only invoked five times in 40 years.

The proposed rule has numerous legal defects, each of which provides an independent basis to invalidate the rule in its entirety.

¹ : The States of Georgia, Indiana, Montana, North Dakota, Ohio and Utah, among others, also intend to file additional separate comments that address the proposed rule.

First, the proposed rule is unlawful because EPA has chosen to regulate coal-fired power plants under Section 112 of the Clean Air Act, 42 U.S.C. § 7412. Section 111(d) specifically prohibits EPA from invoking Section 111(d) where the “source category . . . is regulated under section [112]. . . .” 42 U.S.C. § 7411(d)(1)(A)(i). EPA should abandon its cynical attempt to evade this specific prohibition on its authority found in the Clean Air Act’s plain text.

Second, the proposed rule is unlawful because EPA has not finalized Section 111(b) “new source” regulation of carbon dioxide emission from coal-fired power plants, which is legally necessary before any Section 111(d) regulation of those plants. And given that the *proposed* Section 111(b) new source standards are patently unlawful, no such predicate is likely forthcoming.

Third, the proposed rule impermissibly expands EPA’s authority into the management of states’ energy generation and usage. Rather than limiting itself to EPA’s narrow mandate of air pollution control, the proposed rule forces states to abandon their sovereign rights in favor of a national energy consumption policy.

Fourth, the proposed rule includes inflexible mandates that each state *must* achieve, rather than the guidelines and appropriate procedures for states to use in establishing standards of performance for sources under their jurisdiction that are actually authorized by Section 111(d). This attempt to federalize areas of energy policy improperly proposes to negate states’ authority to determine that EPA’s guidelines are inconsistent with factors such as consideration of costs, physical impossibility, energy needs, and the “remaining useful life of the existing source.”

Fifth, in applying these standards of performance, states are limited to emission standards that can actually be achieved by existing industrial sources through source-level, inside-the-fenceline measures. The proposal’s attempt to force states to regulate energy consumption and generation throughout their jurisdictions, in the guise of reducing emissions from fossil fuel-fired power plants, violates Section 111(d)’s plain-text requirement that the performance standards established for existing sources by the states must be limited to measures that apply at existing power plants themselves.

Sixth and finally, even assuming *arguendo* that EPA has authority to impact energy policy decisions under Section 111(d), the proposed rule’s attempt to federalize control over state energy policy is inconsistent with the Federal Power Act. It is unreasonable for EPA to propose regulation under Section 111(d) that would allow precisely the type of federal control over state decision-making that Congress denied to the federal government in the context of the Federal Power Act.

* * *

Given the multitude of legal deficiencies in its proposal, some of which go to the heart of its authority to regulate fossil-fuel-fired power plants under Clean Air Act Section 111(d), EPA should honor the Act’s core statutory limitations on its authority and formally determine that Section 111(d) standards are not appropriate for fossil fuel-fired power plants. If EPA does finalize Section 111(d) standards for fossil-fuel-fired power plants, it should not perpetuate the unlawful act by attempting to reorganize states’ energy economies, but should instead promulgate emission guidelines based on the best system of emission reduction that is actually

achievable at individual facilities, which states could then consider in establishing performance standards to individual power plants in their jurisdictions.

I. The Clean Air Act Unambiguously Prohibits EPA from Regulating Power Plants Under Section 111(d) Now That EPA Has Chosen To Regulate Those Plants Under Section 112

The Clean Air Act prohibits EPA from regulating any emissions from a “source category” under Section 111(d) where the “source category . . . is regulated under section [112]” 42 U.S.C. § 7411(d)(1)(A)(i).² This prohibition is so clear that even EPA admits that the “literal” meaning of this language is that it “c[an] not regulate *any* air pollutant from a source category regulated under section 112.” EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* at 26 (hereinafter “Legal Memorandum” or “Mem.”) (emphasis added). Or, as the Supreme Court has explained, “EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the ‘hazardous air pollutants’ program, [Section 112].” *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). This unambiguous statutory prohibition is grounded in Congress’s understanding that existing sources—unlike new sources—should not be subject to double regulation, under two different regulatory regimes, in light of special concerns such as reliance and sunk costs.

In 2000, EPA took the discretionary step of classifying power plants as part of a “source category” under Section 112. 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000). Then, in 2012, EPA imposed one of the most expensive regulations in the agency’s history on these power plants under Section 112. 77 Fed. Reg. 9,304 (Feb. 16, 2012). This regulation, which is commonly known as the Mercury and Air Toxics Standard or the Utility MACT Rule, imposed \$9.6 billion in annual costs on the electric generating industry and nearly \$11 billion in total annual social costs, and will cause the retirement of more than 34 gigawatts of fossil fuel-fired electric generating capacity. *See id.* at 9,413, 9,425; Institute for Energy Research, *Impact of EPA’s Regulatory Assault on Power Plants* (June 12, 2012). Given that existing coal-fired power plants are now extensively regulated under Section 112, what EPA has admitted are the “literal” terms of the Clean Air Act prohibit EPA’s present effort to impose yet more onerous regulations on these same plants under Section 111(d). Mem. at 26.

Indeed, one recent study projects that the Proposal will result in from 46 to 169 additional gigawatts retired unless EPA makes significant corrections. *See* NERA Economic Consulting, on behalf of American Coalition for Clean Coal Electricity et al., *Potential Energy Impacts of the EPA Proposed Clean Power Plan* (October 2014). Specifically, the study projects coal-unit retirements of between 97 and 220 gigawatts, as compared to 51 gigawatts under a baseline

² Several of the commenting states have filed suit to invalidate EPA’s proposal on these grounds.

scenario. *Id.* at 15, Fig. 4. Retirements on this scale are likely to seriously threaten the reliability of our nation's electric supply. State regulators and industry stakeholders have warned that the proposal will force them to choose between meeting its requirements at the risk of potentially violating FERC reliability mandates, or complying with those mandates at the risk of failure to comply with the proposal. Southwest Power Pool predicts the proposal will increase retirements in its area by 200%, risking "rolling blackouts or cascading outages" with significant economic, health, and safety impacts.³ And the Electric Reliability Council of Texas warns that the proposal "will have a significant impact on the planning and operation of" its grid, forcing the retirement of between 3.3 and 8.7 gigawatts in its region alone—in short, the proposal threatens "a harmful impact on reliability."⁴ North Dakota officials have expressed concern that FERC may reject on reliability grounds the states' 111(d) plans, and may even impose significant penalties for any blackouts and similar failures that might result from states' efforts to meet EPA's requirements.⁵

FERC Commissioner Moeller has warned that the proposed shift from least-cost to least-emission dispatch priorities "has the potential to completely undermine the market principles that underpin dispatch of the system."⁶ And the North American Electric Reliability Corporation ("NERC"), the international body specifically tasked by Congress with monitoring reliability, has recently determined that "Essential Reliability Services may be strained by the proposed" rule, and that the rule's requirements "represent a significant reliability challenge."⁷ Specifically, NERC observes that, among other factors, "[p]ipeline constraints and growing gas and electric interdependency challenges" and the need for "more transmission and new operating procedures" will limit states' and utilities' ability to comply with the proposal while preserving reliability.⁸ And the retirements of coal-fired units due to the proposal will "lessen[] the industry's diversification of fuel sources."⁹ Cumulatively, these issues mean the proposal will impair the reliability of the grid, especially under extreme weather conditions such as last winter's "polar vortex."¹⁰

³ Southwest Power Pool, Comments on 111(d) Proposal, at 6 (Oct. 9, 2014).

⁴ ERCOT Analysis of the Impacts of the Clean Power Plan, at 1, 10 (Nov. 17, 2014). *See also id.* at 18 ("The proposed CO₂ emissions limitations will result in significant retirement of coal generation capacity, could result in transmission reliability issues due to the loss of fossil fuel-fired generation resources in and around major urban centers, and will strain ERCOT's ability to integrate new intermittent renewable generation resources.").

⁵ InsideEPA, "States Face ESPS Dilemma Over Whether To Comply With EPA Or FERC," Oct. 8, 2014.

⁶ Response of FERC Commissioner Moeller to Additional Questions For the Record from the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Energy and Power, at 5 (Aug. 26, 2014).

⁷ NERC, Potential Reliability Impacts of EPA's Proposed Clean Power Plan, at 1, 2 (Nov. 2014).

⁸ *Id.* at 2.

⁹ *Id.* at 9; *see also id.* at 19 & Fig. 7 (discussing impact of proposal on retirements).

¹⁰ *See id.*

These retirements are likely to impose significant costs on ordinary citizens throughout the country. The NERA study projects an increase in total consumer energy costs of between \$366 billion and \$479 billion over the period 2017-2031. *Potential Energy Impacts* at 21, Fig. 11. (The cost of natural gas for non-electricity energy services is specifically predicted to increase by between \$15 billion and \$144 billion.) This includes an increase of between 13 and 15 percent in electricity prices for residential customers. *Id.* at 25, Fig. 16. These increases will not be evenly distributed. Although prices are projected to rise in all states, the impact will be heaviest in the West, with Texas projected to suffer as much as a 54% increase in prices across all sectors. *Id.* at 25-26, Figs. 16 & 17.

EPA's only legal justification for departing from the Clean Air Act's "literal" text is based upon what EPA has admitted was "a drafting error," *see* 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005), which was properly excluded from the U.S. Code. Specifically, EPA claims that a single clerical entry in the 1990 Amendments to the Clean Air Act somehow renders the plain text of the Act ambiguous and thus permits EPA to regulate. *Mem.* at 25-27. This argument cannot withstand scrutiny. The clerical entry upon which EPA bases its entire rule was a non-substantive "conforming amendment," which was erroneously included in the 1990 Amendments to update a cross-reference to Section 112, tracking the rearrangement of that section elsewhere in the Amendments. But the 1990 Amendments also fundamentally altered Section 111(d) and, in doing so, made the "conforming amendment" impossible to execute. In this exact situation—which is common in modern, complex legislation—the uniform practice is to give full meaning and effect to the substantive change in the law, and to ignore the non-substantive "conforming amendment" as a scrivener's error.¹¹ That is exactly what occurred here, as the codifier of the U.S. Code excluded the conforming amendment because it "could not be executed." Revisor's Note, 42 U.S.C. § 7411. Unsurprisingly, EPA has not cited a single decision, from any area of law, giving any meaning to a clerical change that was rendered moot by a substantive amendment. *See Mem.* at 26-27. To the contrary, controlling caselaw provides

¹¹ *See, e.g.,* Revisor's Note, 5 U.S.C. app. 3 § 12; Revisor's Note, 7 U.S.C. § 2018; Revisor's Note, 8 U.S.C. § 1324b; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1074a; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 1060; Revisor's Note, 15 U.S.C. § 2081; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 18 U.S.C. § 1956; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 22 U.S.C. § 2577; Revisor's Note, 22 U.S.C. § 3651; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 613A; Revisor's Note, 26 U.S.C. § 1201; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 26 U.S.C. § 6427; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 37 U.S.C. § 414; Revisor's Note, 38 U.S.C. § 3015; Revisor's Note, 39 U.S.C. § 410; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 300ff-28; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 42 U.S.C. § 5776; Revisor's Note, 49 U.S.C. § 47115.

that where a mistake in renumbering a statute and correcting a cross-reference conflicts with a substantive change, the mistake should not be considered when construing the substantive provision. *See, e.g., Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

And even if one were to accept EPA's assertion that it must give meaning to an impossible-to-execute clerical amendment, Mem. at 26, the proposed rule would still be unlawful. If the conforming amendment is executed separately from the substantive amendment, two different prohibitions on EPA's Section 111(d) authority would arise. Under one prohibition—in text of the Clean Air Act as reflected in the United States Code—EPA would be prohibited from regulating under Section 111(d) any emissions from any source categories actually regulated under Section 112. Under the “other” prohibition—the one embodied by the conforming amendment—Section 111(d) could not be used to regulate pollutants subject to regulation under Section 112, even if EPA has chosen not to regulate the particular source category at issue. (Given that EPA is not required to regulate all sources of Section 112-regulated hazardous air pollutants under Section 112, 42 U.S.C. § 7412(k)(3)(B)(ii), this category would almost certainly leave some sources of hazardous air pollutants unregulated. Indeed, a special provision of Section 112 permits EPA significant leeway not to regulate power plants at all under Section 112. *Id.* § 7412(n)(1)). Thus, if EPA “give[s] effect, if possible, to every word Congress used,” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), it would be prohibited from invoking Section 111(d) *both* to regulate any source categories actually regulated under Section 112 *and* to regulate any pollutants subject to regulation under Section 112. Accordingly, even if EPA's approach of executing the conforming amendment into a separate “version” of Section 111(d) were permissible—which, to be clear, it is not—this would not salvage the proposed rule.

II. The Proposed Section 111(d) Rule Is Illegal Because EPA Has Not Finalized any Lawful Rule for Equivalent New Sources

Section 111(d) authorizes EPA to prescribe regulations under which States shall establish standards of performance for “any existing source for any pollutant . . . *to which a standard of performance under this section would apply if such source were a new source.*” 42 U.S.C. § 7411(d)(1)(A)(ii) (emphasis added). As EPA has acknowledged since 1975, this provision prohibits EPA from invoking Section 111(d) unless and until it has completed and finalized a lawful rule for “new sources of the same type.” 40 Fed. Reg. 53,340, 53,340 (Nov. 17, 1975); *see also* 39 Fed. Reg. 36,102, 36,102 (Oct. 7, 1974) (proposed rule) (predicates for use of 111(d) include “[a] standard of performance for affected facilities *has been* promulgated under section 111(b) of the Act”) (emphasis added). Put another way, promulgation of lawful new source performance standards is “a necessary predicate for the regulation of existing sources” under Section 111(d). 79 Fed. Reg. 1,430, 1,496 (Jan. 8, 2014). In the present rulemaking, EPA claims that it will satisfy that “necessary predicate” through two proposed rulemakings, once they are finalized: (1) the proposed new source performance standards for new fossil fuel-fired power plants (“New Source Rule”), 79 Fed. Reg. 1,430 (Jan. 8, 2014); and (2) performance standards for modified and reconstructed fossil fuel-fired power plants (“Modified Source Rule”). *See* Proposal, 79 Fed. Reg. 34,852 (June 18, 2014). EPA's arguments are flawed as a matter of law, and as a result the proposed Section 111(d) rule will be entirely unlawful.

First, the New Source Rule—if finalized in anything like its proposed form—will not be a *lawful* predicate for the proposed Section 111(d) rule. The New Source Rule is based upon EPA’s claim that the “best system of emission reduction” for carbon dioxide emission from coal-fired power plants is partial carbon capture and storage (“CCS”). 79 Fed. Reg. at 1,430. But as 16 States explained in their comment letter to EPA, CCS is not the “best system of emission reduction” because CCS has not been shown to be reasonably reliable, efficient, broadly available, or economically feasible in *any* commercial setting. *See* Letter from Sixteen States to Gina McCarthy, Administrator, EPA at 2-8 (May 9, 2014) (docketed at EPA-HQ-OAR-2013-0495-9505) (hereinafter “States’ Comment Letter”). In addition, as the States also explained, the proposed New Source Rule violates the Energy Policy Act of 2005 because EPA’s claim that CCS technologies have been “adequately demonstrated” is based on government-funded projects that would not be economically viable without government funds; the 2005 Act expressly forbids EPA from relying on these projects when setting standards under Section 111. *See* States’ Comment Letter at 8-9. Finally, the New Source Rule is arbitrary and capricious, as the States’ Comment Letter articulated, because EPA’s justifications for the rule are contrary to the agency’s own predictions. Specifically, EPA’s central rationale for promulgating the proposed New Source Rule—that the proposal will protect public health and address climate change—is entirely eliminated by EPA’s own concession that the proposal “will result in negligible CO₂ emission changes, quantified benefits, and costs by 2022.” 79 Fed. Reg. 1,430, 1,433. *See* States’ Comment Letter at 10-11.

Second, EPA’s fallback attempt to argue the Modified Source Rule could provide the “necessary predicate” for its Section 111(d) proposal when the New Source Rule is held unlawful is a transparent and illegal end-run around Section 111’s text and structure. *See* 79 Fed. Reg. at 34,852. Unsurprisingly, EPA can point to no authority or prior examples to support such an approach, because it is plainly unlawful. Under Section 111(d)’s plain text, the predicate rulemaking must lawfully regulate equivalent “new” sources—not simply equivalent modified or reconstructed sources *only*. *See* 42 U.S.C. § 7411(d)(1)(A)(ii). The term “new source” is not ambiguous in this context. Instead, Section 111(a)(2) of the Act defines it as “any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.” 42 U.S.C. § 7411(a)(2). This statutorily mandated sequence reflects Congress’s understanding that, because regulation of existing sources raises special issues of reliance and sunk costs, regulation of those existing sources should only be implemented after regulation of all new sources (including but not limited to modified sources) has been lawfully finalized. Consistent with this plain text, EPA must first promulgate *lawful* standards of performance for new sources (*including* modified sources), and only thereafter may require the states to regulate equivalent existing sources.

As multiple submitted comments on the modified-source proposal demonstrate, the EPA’s position that Section 111’s ostensible silence as to whether a source that undergoes modifications ceases to be an existing source subject to 111(d) standards allows it to subject sources to *both* the 111(b) modified-source and 111(d) existing-source regimes is unlawful. But such arguments from silence are an “untenable” means of proving agency authority. *See infra* Section III; *see also Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003). Both the structure of Section 111 and its subsections defining “new” and “existing”

sources make perfectly clear that these are mutually exclusive terms: an “existing” source that undergoes modifications becomes a “modified” source, *which is treated as a “new” source for Section 111’s purposes*, and therefore falls under 111(b) alone. Because EPA may not lawfully issue a Section 111(b) modified source rule that covers only modified sources, let alone impose *both* that rule *and* a 111(d) rule on existing sources that undergo modifications, the modified-source rule will not and cannot provide a lawful predicate for the existing-source rule.

III. Section 111(d) Cannot Be Used To Override State Authority To Manage Power Resources

One of a state’s core police powers is the power to promote the health and economic well-being of its citizens, including through the management of its energy and air quality resources. This sovereign power includes the authority to regulate—or not to regulate—the production and local distribution of electricity to its citizens. In states with significant coal resources, where mining operations are important employers and coal-fired energy can be generated inexpensively, states have authority to do so. Similarly, states that choose to exploit renewable energy resources, whether because those resources are affordable or because their citizens are willing to pay a premium for them, are free to follow that path. The Clean Air Act’s role is limited to ensuring that, whatever path each state chooses, new and modified power plants meet state-of-the-art technology standards and pollution from all sources in a state does not interfere with national air quality goals.

In contrast, under the current Section 111(d) proposal, EPA’s binding emission “goals” applicable to each state would require states to shift electric generation from coal- to gas-fired plants, to increase electric generation from sources other than fossil fuel-fired power plants, and to take measures that reduce electricity consumption or increase energy efficiency at the end-use, consumer level. In this way, the proposal combines a renewable energy portfolio with demand-side control measures to create a *de facto* national energy policy, at the expense of state authority and economic freedom. And there is no limiting principle to EPA’s asserted reach under the proposal. Under EPA’s reading of the Act, the agency could require states to mandate that consumers dim their lights on alternate days, limit home builders to constructing only two-story buildings, or shutter public schools during periods of peak energy usage. Because virtually all human activity in the modern age depends on electricity, regulation of any aspect of that activity could be viewed as affecting electricity production, which in turn affects power plants’ carbon dioxide emissions. EPA’s approach converts the obscure, little-used Section 111(d) into a general enabling act, giving EPA power over the entire grid from generation to light switch. This, in turn, would give EPA plenary authority over much of the national economy.

The putative legal rationale for the Section 111(d) proposal is, primarily, based on EPA’s claim that the statutory term “best system of emission reduction,” and in particular its component term “system,” are ambiguous and constitute a significant delegation of authority to regulate electricity production, transmission, distribution, and consumption in an unprecedented and unlimited manner. *See, e.g.*, Proposal, 79 Fed. Reg. at 34,885-86. But Section 111(d)’s narrow terms do not countenance this unlimited assertion of power.

EPA’s Section 111(d) proposal makes a fundamental error that leads to reversal of agency action on a regular basis: an argument that Congress’s failure to expressly withhold

authority to take some action constitutes a license to do so. But as courts must frequently remind agencies, “[a]mbiguity is a creature not of definitional possibilities but of statutory context.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). “Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.” *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *see also Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003) (vacating USPS rule limiting non-profit organizations’ use of reduced mailing rates where the Service took the position “that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency,” which the court determined to be “entirely untenable under well-established case law”) (collecting cases).

Taken in context, Section 111(d) has rightly been understood as a regulatory backwater, as Congress never intended it to be a major Clean Air Act regulatory program.

According to EPA, in the 44 years since Section 111(d) was first promulgated as part of the Clean Air Amendments of 1970, only *five* source categories have been subject to regulation under Section 111(d). Mem. at 9-10. Some of these source categories contained as few as 31 sources nationwide,¹² and many were not present throughout the country (for example, phosphate fertilizer plants were found in only 17 states, and primary aluminum plants in only 16).¹³ And the only previous 111(d) rule to address common, nationwide sources, the 1996 landfill rule—the only 111(d) rulemaking since 1980—bore projected annual costs of about 1.5% of those of the current proposal.¹⁴ By any relevant metric, the scope of EPA’s current Section 111(d) proposal dwarfs these past measures:

	Annualized Costs	Number of Affected Sources
Current Proposal	\$8.8B (\$2011) ¹⁵	1,228 ¹⁶
1977 Phosphate Fertilizer Rule¹⁷	Not specified	53 ¹⁸

¹² See Table *infra*.

¹³ See *Final Guideline Document: Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants*, EPA-450/2-77-005, § 3.1, at 3-5 to 3-15 (Tables 3-3 to 3-6) (Mar. 1977); *Primary Aluminum: Guidelines for Control of Fluoride Emissions from Existing Primary Aluminum Plants*, EPA-450/2-78-049b, § 3.1.1, at 3-3 to 3-5 (Table 3-1).

¹⁴ See Table *infra*.

¹⁵ Proposal, 79 Fed. Reg. at 34,839, 34,840 (Table 2).

¹⁶ EPA, *Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants*, at 3-47 (June 2014).

¹⁷ 42 Fed. Reg. 12,022 (Mar. 1, 1977) (“control of atmospheric fluoride emissions from existing phosphate fertilizer plants”).

	Annualized Costs	Number of Affected Sources
1977 Sulfuric Acid Plant Rule¹⁹	Not specified	251 ²⁰
1979 Kraft Pulp Mill NSPS²¹	\$200M to \$441M ²² (est. \$790M to \$1.74B in \$2011 ²³)	120 ²⁴
1980 Primary Aluminum Plant Rule²⁵	Not specified	31 ²⁶
1996 Municipal Solid Waste Landfill Rule²⁷	\$90 million ²⁸ (est. \$132 million in \$2011 ²⁹)	312 ³⁰

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¹⁸ See *Final Guideline Document: Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants*, EPA-450/2-77-005, § 3.1, at 3-5 to 3-15 (Tables 3-3 to 3-6) (Mar. 1977).

¹⁹ 42 Fed. Reg. 55,796 (Oct. 18, 1977) (“control of sulfuric acid mist emissions from existing sulfuric acid plants”).

²⁰ See *Final Guideline Document: Control of Sulfuric Acid Mist Emissions from Existing Sulfuric Acid Production Units*, EPA-450/2-77-019, § 2.2.1, at 2-2 (Sept. 1977) (“U.S. production capacity in March 1971 was estimated at 38.6 million short tons and was accounted for by 251 plants.”).

²¹ 44 Fed. Reg. 29,828 (May 22, 1979) (“control of total reduced sulfur (TRS) emissions from existing kraft pulp mills”).

²² See *Kraft Pulping: Control of TRS Emissions from Existing Mills*, EPA-450/2-78-003b, § 8.5, at 8-34 (Table 8-14) (Mar. 1979).

²³ These cost estimates were expressed in \$1976. Calculation obtained at <http://www.dollartimes.com/calculators/inflation.htm>.

²⁴ See *Kraft Pulping: Control of TRS Emissions from Existing Mills*, EPA-450/2-78-003b, § 3.1, at 3-1 (Mar. 1979) (“As of December 1975, there were 56 firms operating about 120 kraft pulping mills in 28 states.”).

²⁵ 45 Fed. Reg. 26,294 (Apr. 17, 1980) (“control [of] fluoride emissions from existing primary aluminum plants”).

²⁶ See *Primary Aluminum: Guidelines for Control of Fluoride Emissions from Existing Primary Aluminum Plants*, EPA-450/2-78-049b, § 3.1.1, at 3-1 (Dec. 1979) (“Primary capacity in the U.S. at the end of 1977 was estimated at 5.19 million short tons and was accounted for by 31 plants.”) (footnotes omitted).

²⁷ 61 Fed. Reg. 9,905 (Mar. 12, 1996) (“The emissions of concern are non-methane organic compounds (NMOC) and methane.”).

²⁸ “The nationwide cost of the EG [emission guidelines, *i.e.*, the existing-source rule under Section 111(d)] would be approximately \$90 million.” 61 Fed. Reg. at 9,916.

The current Section 111(d) proposal would transform this regulatory backwater into the single most intrusive and prominent aspect of the Clean Air Act, by requiring that states formulate plans that change how electricity is generated, supersede traditional state public service commission authority, and affect how consumers use electricity. There is a long history of federal courts invalidating similar attempts by administrative agencies to unmoor limited grants of legislative authority like Section 111(d) from their organic statutes by transforming them into broad mandates that aggrandize agencies' power at the expense of the states and the regulated community. For example, in *Electric Power Supply Association v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), the D.C. Circuit rejected the Federal Energy Regulatory Commission's recent attempt to regulate retail energy demand in the guise of regulating wholesale electric markets, because that regulation would impair states' exclusive right to regulate retail electric markets and lacked any meaningful "limiting principle." *Id.* at 221. The lack of a limiting principle was key, because if this justification for FERC's exercise of its authority prevailed, it could authorize virtually any intrusion on state retail electric market regulatory authority, allowing FERC to arrogate broad authority that Congress did not confer. Notably, the connection between FERC's area of authority (wholesale electricity market) and the challenged regulation (retail energy demand) was considerably more direct than here, and yet the regulation was held to exceed the Commission's statutory authority nonetheless.

Similarly, in *California Independent System Operator Corp. v. FERC* ("CAISO"), 372 F.3d 395, 399 (D.C. Cir. 2004), the D.C. Circuit rejected FERC's attempt to replace the California Independent System Operator Corporation's governing board under its authority to regulate "practice[s]" affecting "rates and charges" in the wholesale electric markets. The court held that the issue is not whether "the word 'practice' is, in some abstract sense, ambiguous, but rather whether, read in context and using the traditional tools of statutory construction, the term 'practice' can encompass the procedures used to select CAISO's board." *Id.* at 400. The court concluded that FERC's construction of "'practice' in this context is . . . a sufficiently poor fit with the apparent meaning of the statute that the statute is not ambiguous on the very question before us." *Id.* at 401 (citing *Brown*, 513 U.S. at 120). In that case, too, the court found the lack of a limiting principle on FERC's assertion of authority critical because of the "staggering" and "drastic implications of [FERC's] overreaching," noting that the agency's reasoning would "apply to its regulation of all other jurisdictional utilities," allowing it "tomorrow without any

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²⁹The 1996 Landfill Rule did not specify which year's dollars were used in the cost estimate. Assuming \$1995, that translates to \$131 million in \$2011 (calculation obtained at <http://www.dollartimes.com/calculators/inflation.htm>).

³⁰"The EG will require control of approximately 312 existing landfills." 61 Fed. Reg. at 9,914.

further precedent or any further claim of expanded power” to, for instance, remove and replace Duke’s or Dynegy’s boards of directors.³¹

This line of authority unquestionably forbids EPA’s attempts to interpret the Clean Air Act so as to aggrandize its authority to regulate greenhouse gases in a manner untethered to the historic understanding of the Act. In *Utility Air Regulatory Group v. EPA* (“*UARG*”), 134 S. Ct. 2427 (2014), the Court considered EPA’s interpretation of its permitting authority under the Act’s prevention of significant deterioration preconstruction permitting program. EPA interpreted these provisions to include greenhouse gases among those pollutants that trigger an emitting source’s obligation to obtain certain preconstruction and operating permits, thereby massively expanding the permitting provisions’ potential reach beyond anything of which Congress could have conceived at the time it passed the Act. The Court held EPA’s interpretation unreasonable in part “because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.” *Id.* at 2444. “When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.” *Id.* (internal quotation marks and citation omitted). See also *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (“‘In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, . . . judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.’”) (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)); *Aid Ass’n for Lutherans*, 321 F.3d at 1175 (“Given the extremity of the effect that results from the Postal Service’s interpretation, we would expect to see some indication that Congress intended such an effect, but we find no[ne] in the statute . . .”).

Section 111(d) was never intended to authorize EPA to establish a *de facto* national energy policy. To interpret Section 111(d) in that manner would expand and transform EPA’s regulatory authority in ways that Congress never intended. Indeed, the transformation here is even more extreme than the one that the Supreme Court recently rejected in *UARG*. There, EPA “merely” proposed to rewrite a pre-existing permitting regime to include greenhouse gases, largely (but not solely) in situations where industrial sources would already have to obtain preconstruction or operating permits. But in the case of Section 111(d), the agency proposes to create a new regulatory program from whole cloth that applies without limitation to all fossil fuel-fired power plants and any other source “roped in” by a state or EPA in a manner that constitutes centralized energy and economic reorganization. To say the least, “skepticism” is all the more appropriate in the face of such a sweeping proposal, *UARG*, 134 S. Ct. at 2444. Whatever gaps or ambiguities EPA purports to discover and interpret in the Clean Air Act, the

³¹ Another important consideration in the *CAISO* case was the conflict that this action would cause with other federal statutes, yet another unlawful characteristic of the Section 111(d) proposal that is discussed in detail below. 372 F.3d at 404; see *infra* Section VI.

agency cannot bootstrap them into providing it “an unheralded power to regulate” the states’ energy sectors, *id.*

To make the situation worse for EPA, the sweeping assertion of authority in its Section 111(d) proposal not only violates the Clean Air Act’s text and structure, but also infringes on a traditional area of state authority. As a result, the Section 111(d) proposal implicates black-letter precedent requiring Congress to provide an extremely clear statement of its intent to authorize such an intrusion on the state’s traditional police powers.

Most recently, in *Bond v. United States*, 134 S. Ct. 2077 (2014), the Supreme Court overturned the conviction of a Pennsylvania woman under the implementing legislation for the Chemical Weapons Convention. “Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.” *Id.* at 2083. This reasoning is not limited to the criminal context, but derives from the broader principle that “‘it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ the ‘usual constitutional balance of federal and state powers.’” *Id.* at 2089 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). In other words, “it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.” *Id.* at 2090. Finding no “clear statement that Congress meant the statute to reach local criminal conduct,” the court held that the statute did not do so. *Id.*

Similarly, in *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), the D.C. Circuit held that the FTC could not regulate attorneys under the Gramm-Leach-Bliley Act on the theory that attorneys and their law firms were “financial institutions” because they were “entities engaged in ‘financial activities.’” *Id.* at 466. At *Chevron* step one, the court determined that the statute’s broad definition of “financial institution” was not ambiguous in the manner asserted by the FTC, in part because the court found “it difficult to believe that Congress, by any [latent] ambiguity, intended to undertake the regulation of the profession of law—a profession never before regulated by ‘federal functional regulators’—and never mentioned in the statute.” *Id.* at 469. And at *Chevron* step two, the court determined that, even if the statute were ambiguous in the necessary sense, under *Gregory* and other precedent, Congress had not made the requisite clear statement that it intended to alter the usual constitutional balance by invading areas of traditional state sovereignty. *Id.* at 471-72.

Simply put, Congress has given no clear indication of its intent to authorize EPA to invade state authority to decide energy and resource-planning policy. *Bond* and *American Bar Association* reinforce the fact that under the “usual constitutional balance,” these are areas of traditional state jurisdiction, and that any arguable ambiguity found, for instance, in the breadth of terms such as “system of emission reduction” must be resolved in the states’ favor by reference to the “basic principles of federalism.”

IV. Section 111(d) Limits EPA’s Role in the First Instance to Procedure, Not Substance

Consistent with Congress’s view of Section 111(d) as a limited program for filling a minor regulatory gap for certain minor categories of sources, Section 111(d) limits EPA’s role to one of procedure. EPA may promulgate regulations to establish a “*procedure*” under which

states submit implementation plans that establish standards of performance for existing sources subject to regulation under Section 111(d). But the states, in developing their implementation plans, are the ones on whom Congress conferred authority to actually establish “standards of performance” for existing sources. *See* 42 U.S.C. § 7411(d)(1) (directing EPA to “prescribe regulations which shall establish a *procedure* . . . under which each State shall submit to the Administrator a plan” that establishes standards of performance) (emphasis added). *Compare* § 7411(b)(1)(B) (directing EPA to “establish[] Federal *standards* of performance for new sources” directly) (emphasis added).

EPA promulgated general “implementing regulations” under Section 111(d) in 1975. *State Plans for the Control of Certain Pollutants from Existing Facilities*, 40 Fed. Reg. 53,340 (Nov. 17, 1975), *codified as amended at* 40 C.F.R. §§ 60.22-60.29. Under these regulations, EPA may promulgate “emission guidelines” that reflect EPA’s opinion as to the degree of emission reduction achievable through the “best system of emission reduction” that the agency believes to be “adequately demonstrated” for the regulated existing sources. *See* 40 C.F.R. §§ 60.21(e) (defining “emission guideline”), 60.22(b)(5). But the states are expressly authorized by the Clean Air Act to apply less stringent standards to individual sources or classes of sources. 42 U.S.C. § 7411(d)(1). In so doing, *states*—not the EPA—consider cost, practical achievability, a source’s “remaining useful life,” and other source-specific factors when applying these standards to particular sources. *Id.*; *see also* 40 C.F.R. § 60.24(f).

Only when a state fails to submit a satisfactory implementation plan—that is, one that is unreasonable or fails to comport with the Act’s statutory criteria—is EPA authorized to perform its second function under 111(d)(2): directly prescribing binding standards for sources. *See* 42 U.S.C. § 7411(d)(2); *see also* 40 C.F.R. § 60.27(c)(3). *Cf. Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 494 (2004) (ultimate issue in Prevention of Significant Deterioration program is whether state agency’s determinations are “reasonable, in light of the statutory guides and the state administrative record”).

EPA’s proposal pays lip service to this process while blatantly violating it. The proposal sets a mandatory, binding “goal” for each state, in the form of an emission rate for the state’s entire power sector. Under EPA’s proposal, once these “goals” are finalized, states will have no discretion to alter them. *See, e.g.,* Proposal, 79 Fed. Reg. at 34,835 (“Once the final goals have been promulgated, a state would no longer have an opportunity to request that the EPA adjust its CO₂ goal.”), 34,897-98 (rejecting stakeholder suggestion that states be allowed to quantify levels of emission reduction or otherwise treat EPA’s goals “as advisory rather than binding”), 34,892 (“As promulgated in the final rule following consideration of comments received, the interim and final goals will be binding emission guidelines for state plans.”).

In fact, even if a state can demonstrate that it cannot meet EPA’s projected emission reductions by implementing a particular aspect of the proposed “best system of emission reduction,” EPA will not adjust the state’s “goal” unless the state demonstrates that it cannot realize additional reductions from applying the *other* aspects of that “system” more aggressively, or from “related, comparable measures.” *Id.* at 34,893. The proposal thus violates Congress’s unambiguously expressed intent in Section 111(d).

EPA argues that states will still have the flexibility to apply less stringent standards to individual sources, but this elides the real issue. *See* Proposal, 79 Fed. Reg. at 34,925-26. Given the flexibility afforded to states under Section 111(d)’s plain text, valid state implementation

plans may result in a range of actual state-wide emission rates. As the states exercise their authority to appropriately adjust EPA's "guidelines" for certain sources and classes of sources, the sources across a given state may in the end collectively emit a substance at a greater or lesser rate. And there is nothing unusual about this result, because before now EPA has properly restricted its 111(d) regulations to set guidelines for source emissions—not total state emissions.

EPA attempts to justify this by reference to the statutory definition of "standard of performance" as "a standard for emissions which reflects the *degree* of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a)(1) (emphasis added). EPA reads "degree" to mean "portion," and offers the interpretation that "[t]hat 'degree' or portion of the required emission performance level is, in effect, the portion of the state's obligation to limit its affected sources' [aggregate, statewide] emissions that the state has assigned to each particular affected source." Proposal, 79 Fed. Reg. at 34,891. But EPA offers no authority, not even a dictionary citation, for construing "degree" as "portion." And the agency offers no statutory basis for a state's putative obligation to limit its sources' *aggregate* emissions, because there is none whatsoever. States "*establish*" standards of performance "for existing source[s]," thereby setting *those individual sources'* obligations to limit their emissions. The concept of a predetermined aggregate cap under which the *state* parcels out "portions" of *its* limitation obligation has no basis in the implementing regulations or EPA's past practice under 111(d), let alone in the Act itself. EPA's proposal also contradicts itself, as it defines "emission performance level" as "the level of emissions performance for affected entities specified in a state plan." *Id.* at 34,956 (text of proposed rule). That definition describes something already existing under the statute and defined in EPA's regulations: it is precisely the "standard of performance" which the *state* establishes for existing sources under 111(d)(1). But as quoted above, Proposal, 79 Fed. Reg. at 34,891, EPA speaks of sources being "assigned" a portion of a statewide "emission performance level." The agency cannot spin statutory authority for itself out of air simply by multiplying regulatory definitions for terms of its own invention found nowhere in the Act.

In essence, EPA here treats each state as nothing more than a giant source of carbon dioxide, and imposes on each state binding, inflexible emission limits. The so-called "flexibility" offered to states here is no greater than the flexibility a regulated *source* always enjoys under the Clean Air Act, because individual sources can devise alternative methods to reach emission levels prescribed by EPA. *See, e.g.*, 42 U.S.C. § 7411(b)(5), (h) (forbidding EPA to require installation of particular technological systems absent narrowly specified circumstances). But *states* are entitled to flexibility not only in procedural means but also in substantive ends. EPA's proposal reverses this statutory scheme, promoting the agency to the role of setting binding, substantive standards in the first instance and relegating the states to a ministerial, administrative role. In this, EPA claims the authority to strip states of their statutory discretion to take account of their unique circumstances, needs, and interests.

If EPA can ever issue lawful Section 111(d) rules regulating coal-fired power plants—that is, after first having withdrawn its regulation of those power plants under Section 112, and then having issued lawful regulations for new power plants under Section 111(b)—EPA still must adopt a wholly different approach to Section 111(d) regulation than the one it takes in the present proposal. Under this alternative, lawful approach, EPA would analyze the types of projects that could reduce greenhouse gas reduction at existing sources of coal-fired power plants

by reference to Section 111's criteria, which considers such factors as cost and performance in arriving at guidelines about what emission rates are actually achievable as the "best system of emission reduction" for various categories and subcategories of fossil-fuel-fired power plants. EPA has completed some of this work with its first "building block," efficiency improvements at power plants, but even that proposal is flawed because it overestimates the efficiency improvements that are available at individual power plants by considering this matter on a statewide basis. Under this lawful approach, states would then establish and apply standards of performance to existing power plants, drawing on their local knowledge and considering the individual sources and classes of sources within their jurisdictions. This approach would honor the proper roles of the federal and state governments and result in performance standards that are appropriate for and achievable by regulated sources.

V. Section 111(d) Is Limited to Source-Level, Inside-the-Fenceline, Unit-by-Unit Emission Reduction Measures

Section 111(d) unambiguously mandates that, where other statutory prerequisites are satisfied, *see supra* Section II., states must establish standards of performance applicable to *individual sources* of pollutants. *See, e.g.,* 42 U.S.C. § 7411(d)(1)(A) (state plans "establish[] standards of performance *for any existing source . . . to which* a standard of performance under this section would apply if such existing source were a new source") (emphasis added). EPA's proposal radically departs from this approach. The agency proposes to determine that the "best system of emission reduction" for power plants is composed of four "building blocks." *See, e.g.,* Proposal, 79 Fed. Reg. at 34,835. Only the first "building block"—efficiency gains from heat-rate improvements achieved "inside the fenceline" of particular coal plants—is arguably authorized under 111(d). *See id.* at 34,859-62; *but cf. UARG*, 134 S. Ct. at 2448 ("assuming without deciding" that another provision of the Act "may be used to force some improvements in energy efficiency" while stressing that "important limitations" must be observed to guard against "'unbounded' regulatory authority," even where EPA regulates only *inside-the-fenceline* energy efficiency).

The other three "building blocks" envision the reshaping of state resource-planning and energy policy, in the form of shifting generation from coal- to gas-fired plants, shifting generation from fossil fuels altogether to renewable resources, and end-use efficiency measures. *See* Proposal, 79 Fed. Reg. at 34,862-75. And while EPA does not formally require states to employ a precise *mixture of* these "outside-the-fenceline" measures, the state "goals" are stringent enough that they cannot be met by the first "building block" alone. (Indeed, the agency does not suggest that they can be.) Many state "goals" are set well below the rate achievable by even a state-of-the-art gas-fired plant, let alone a coal-fired one. *See id.* at 34,895 (Table 8—Proposed State Goals). These "goals" can only be met by substantial revision of a state's sector-wide approach. The "best system of emission reduction" proposed here is therefore a *de facto* national energy policy.

This type of regulatory adventurism contradicts the Supreme Court's recent decision in *UARG*. There, the Court considered limitations on the scope of EPA's authority in requiring sources to apply "best available control technology" for greenhouse gases under the prevention of significant deterioration preconstruction permitting program. The Court observed that such

“control technology” cannot require “fundamental redesign” of facilities, is “required only for pollutants that the source itself emits,” and “should not require every conceivable change that could result in” improvements. 134 S. Ct. at 2448.

Notably, “performance standards” under Section 111 are closely linked to “best available control technology” by express definition and by statutory context. EPA’s 111(d) proposal exceeds those limitations by requiring “fundamental redesign” not only of individual facilities but of a state’s entire energy sector and by proposing measures far removed from at-the-source emissions.

First, the program-specific definitions of “best available control technology” and “performance standards”—found, respectively, in the prevention of significant deterioration program and in the new- and existing-source performance standards program (i.e., Section 111)—are highly similar. “Best available control technology” is defined as “an *emission limitation* based on the *maximum degree* of reduction . . . *achievable* for [a] facility.” CAA § 169(3), 42 U.S.C. § 7479(3) (emphases added). And “standard of performance” is defined as “a standard for emissions of air pollutants which reflects the *degree of emission limitation achievable* through the application of the best system of emission reduction which . . . has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1) (emphasis added). In other words, both terms are defined by reference to “emission limitation”; the primary difference is that “best available control technology” represents the most stringent limitation achievable, whereas “performance standards” are not defined by maximum possible stringency, but by the “best system . . . adequately demonstrated.” This relationship is confirmed by the fact that the definition of “best available control technology” explicitly links the two phrases: “best available control technology” must be at least as stringent as Section 111 standards. 42 U.S.C. § 7479(3) (“In no event shall application of ‘best available control technology’ result in emissions . . . which will exceed the emissions allowed by any applicable standard established pursuant to” 111). The former is simply intended to be a stricter version of the latter.

Second, the Act’s general definitions of “emission limitation” and “performance standards” are also closely related. “Emission limitation” is defined at CAA § 302(k), 42 U.S.C. § 7602(k) as “a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement related to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.” And “performance standards” are defined, in the subsection immediately following, as “a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.” CAA § 302(l), 42 U.S.C. § 7602(l). Both terms refer to requirements that cut emissions on a continuous basis, and both are illustrated by the same “including any requirement . . .” phrase. The major difference is that “emission limitation” is given another “including” phrase (“any design, equipment . . .”). In other words, “emission limitations” arguably encompass a broader range of measures than do “performance standards.” And because the definition of “performance standards” only contains the “including” phrase that expressly refers to “the operation or maintenance of a source,” any confining of “emission limitation”—and therefore of “best available control technology,” which, recall, is expressly defined at § 7479(3) as an “emission limitation”—to inside-the-fenceline measures should apply with equal or greater force to “performance standards.”

Third, certain provisions of the 2005 Energy Policy Act confirm that “best available control technology” and Section 111 “performance standards” are linked concepts. Congress restricted EPA’s ability to rely on data from facilities receiving assistance under that Act when it sets either of these types of standards under the Clean Air Act, *see* 42 U.S.C. § 15962(i). (As discussed at Section II *supra*, EPA’s violation of this restriction is one of the reasons why EPA’s proposed New Source Rule is unlawful and will not survive review.) Even when drafting legislation that primarily addressed another subject area (energy policy as opposed to pollution control), Congress was mindful of the close relationship between these two terms.

Fourth, at oral argument in *UARG*, the Solicitor General made this argument in an attempt to prevail: “Section 7411 and the PSD program are not aimed at different problems. They are aimed at the same problem, and you can see that from the statutory text. . . . Congress specifically linked the operation of the Section 7411 standards and the Best Available Control Technology under the PSD program. . . . [O]nce Congress has set a standard under Section 7411, . . . that becomes a floor for the evaluation of Best Available Control Technology.” *UARG*, No. 12-1146, Transcript of Oral Argument at 46-48 (Solicitor General Verrilli, Feb. 24, 2014). On this point, the government was entirely correct. The two address the same problem and take the same form—how else could one set a “floor” for the other?—and should therefore be subject to the same limitations.

EPA’s justifications for not stopping at the fenceline are specious and contrary to the statutory text. *See* Proposal, 70 Fed. Reg. at 34,856. EPA argues that the word “system” in the statutory phrase “best system of emission reduction” is broad enough to encompass these “outside-the-fenceline” measures. *See id.* at 34,885-86 (relying on dictionary definition of “system” as “[a] set of things working together as parts of a mechanism or interconnecting network”).

But Section 111 does not actually grant EPA authority to regulate a “system.” Rather, the statute provides that EPA and the states may set standards for emissions based on “*the application of the best system of emission reduction*.” 42 U.S.C. § 7411(a)(1) (emphasis added). This statutory phrase directs the agency (in the new-source, 111(b) context) or the state (in the existing-source, 111(d) context) to establish standards of performance by applying the “system of emission reduction” *to the individual sources* with the source category being regulated. (In keeping with this, the 111(a) definition section defines “new source” and “stationary source” immediately after defining “standard of performance.” *Id.* § 7411(a)(2), (3).)

The term “standard of performance” itself can only be understood in context of a source-specific limit, as it is defined as “a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance *of a source* to assure continuous emission reduction.” *See* CAA § 302(l), 42 U.S.C. § 7602(l) (emphasis added). Indeed, the meaning of the term “application” in the context of a standard for emissions recurs throughout the Act and can only be understood in the context of an individual source. Considering again Section 169(3) of the Act, defining the “best available control technology” (“BACT”) that must be applied to new or modified sources under the prevention of significant deterioration program, the Act provides that “[i]n no event shall *application of* [BACT] result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to” Sections 111 or 112. 42 U.S.C. § 7479(3) (emphasis added). Similarly, the definition of lowest achievable emission rate (“LAER”) for the nonattainment new source review program provides that “in no event shall the *application of* [LAER] permit a proposed new or modified source to

emit any pollutant in excess of the amount allowable under applicable new source standards of performance.” CAA § 171(3), 42 U.S.C. § 7501(3) (emphasis added). Put another way, whatever the “best system” is, it must be a system that reduces emissions from *a particular source* “to which a standard of performance under this section would apply if such existing source were a new source.” 42 U.S.C. § 7411(d)(1)(A)(ii).

Even if EPA did have authority to regulate a “system,” its proposed regulation here would fail. “The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). In the context of emission control, the Clean Air Act displays a consistent and clear pattern of referring to “systems” as source-specific measures.³² “Best system of emission reduction” as used in Section

³² See, e.g., CAA § 110(j), 42 U.S.C. § 7410(j) (conditioning issuance of all permits required under Title I on a showing by the owner or operator of each new or modified stationary source “that the technological *system* of continuous emission reduction *which is to be used at such source* will enable it to comply with the standards of performance which are to apply to such source”) (emphases added); CAA § 111(b)(5), 42 U.S.C. § 7411(b)(5) (providing that, except as authorized under subsection (h), the Administrator may not require “any new or modified source *to install and operate* any particular technological *system* of continuous emission reduction to comply with any new source standard of performance”) (emphases added); CAA § 112(r)(7)(A), 42 U.S.C. § 7412(r)(7)(A) (providing that accidental-release-prevention regulations may “make distinctions between various types, classes, and kinds of facilities, devices and *systems* taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present *at any stationary source*”) (emphases added); CAA § 169(3), 42 U.S.C. § 7479(3) (defining best available control technology, or BACT, as an “emission limitation based on maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable *for such facility* through application of production processes and available methods, *systems*, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant”) (emphasis added); CAA § 206(a)(2), 42 U.S.C. § 7525(a)(2) (“The Administrator shall test any emission control *system incorporated in a motor vehicle* or motor vehicle engine submitted to him by any person”) (emphasis added); CAA § 206(a)(3)(A), 42 U.S.C. § 7525(a)(3)(A) (Administrator may issue a certificate of conformity only if the manufacturer establishes “that any emission control device, *system*, or element of design *installed on, or incorporated in, such vehicle or engine* conforms to applicable requirements”) (emphases added); CAA § 207(c)(3)(A), 42 U.S.C. § 7541(c)(3)(A) (“The manufacturer shall provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and *systems* may be performed by any automotive repair establishment or individual”) (emphasis added); CAA § 402, 42 U.S.C. § 7651a(7) (defining “continuous emission monitoring *system*” as “the *equipment* as required by section 7651k of this title”) (emphases added)); CAA § 415, 42 U.S.C. § 7651n(c) (providing that a coal-fired utility’s physical or operational changes

111 falls within the statute's norm, rather than the exception: "systems" limiting emissions are source-specific unless indicated otherwise. The Section governs the issuance of performance standards, and "standard of performance" is defined at § 7602(l) to mean "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." The *only* example given in this definition is expressly source-specific. In the few instances where the Clean Air Act intends the term "system" to refer to a geographically dispersed "set of things," it does so expressly, as in Section 319(a) of the Act, directing the Administrator to "promulgate regulations establishing an air quality monitoring system throughout the United States." 42 U.S.C. § 7619(a).

In this regard, EPA's attempt to take the term "system" out of context is akin to the situation that the Supreme Court faced in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994). There, the Supreme Court rejected the agency's position that its decision to make tariff filing optional for all nondominant long-distance carriers was within its statutory authority to "modify any requirement" under 47 U.S.C. § 203. *Id.* at 225. Despite the seeming breadth of the term "modify," the court determined that the word's plain meaning is to make a *moderate* change, whereas the challenged order made a "radical or fundamental change." *Id.* at 228-29. Instead, by "eliminat[ing a] crucial provision of the statute for 40% of a major sector of the industry," the agency had engaged in "a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934." *Id.* at 231-32. The order "is effectively the introduction of a whole new regime of regulation," *id.* at 234.

By going beyond source-level, inside-the-fenceline measures, EPA's proposal would expand 111(d), and specifically the underlying statutory term "best system of emission reduction," into "a whole new regime of regulation": one that regulates not only pollutant emission by sources, but a state's entire resource and energy sectors.

And notably, courts have in the past rejected a similar attempt by EPA to re-define the fundamental level at which Section 111's "best system of emission reduction" applies by disaggregating that concept from the concept of an individual source as defined by statute. In *ASARCO Inc. v. EPA*, 578 F.2d 319, 326-27 (D.C. Cir. 1978), the D.C. Circuit invalidated EPA regulations interpreting Section 111(a)(3)'s definition of "stationary source" to "allow a plant operator who alters an existing facility in a way that increases its emissions to avoid application of the NSPSs by decreasing emissions from other facilities within the plant." *Id.* at 325. EPA argued that the broad statutory definition gave it "'discretion' to define a stationary source as

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will not trigger Section 111 applicability where, among other conditions, the unit was inactive for 2 years prior to the 1990 Amendments and "was equipped prior to shutdown with a continuous system of emissions control" that met certain technical standards) (emphases added).

either a single facility or a combination of facilities.” *Id.* at 326. (This type of aggregation is known as the “bubble concept,” *e.g.*, *id.* at 321.)

The court disagreed, holding that the “regulations plainly indicate that *EPA has attempted to change the basic unit to which the NSPSs apply . . .*” *Id.* at 326-27 (emphasis added). (See also *id.* at 322: “The basic controversy in the cases before us concerns the determination of the units to which the NSPSs apply.”).³³ In the current Section 111(d) proposal, EPA takes the even more egregious action of changing the field of regulation from *sources* to *a state’s entire power sector*. Given that EPA lacks the authority to expand “performance standards” to apply collectively to all regulated facilities at a *single industrial site*, it is not credible to suggest that the “best system of emission reduction” underlying such standards can encompass measures adopted throughout *the state’s entire power sector*.

³³ *ASARCO* does not conflict with the Supreme Court’s decision six years later in *Chevron*, holding that the “bubble concept” was appropriate in the context of the nonattainment new source review program. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Whereas *ASARCO* considered the definition of “stationary source” provided in and for Section 111, *Chevron* construed the *undefined* use of the term “major stationary sources” in § 172(b)(6) of the Act (then codified at 42 U.S.C. § 7502(b)(6), with its post-1990 equivalent now found at § 7502(c)(5)).

Section 172(b)(6), added in the 1977 Amendments as part of a new program addressing areas that failed to attain national ambient air quality standards, required state implementation plans under the NAAQS program to “require permits for the construction and operation of new or modified major stationary sources.” See *Chevron*, 467 U.S. at 849 & n.22 (“The focal point of this controversy is one phrase in that portion of the [1977] Amendments. . . . Specifically, the controversy in these cases involves the meaning of the term ‘major stationary sources’ in § 172(b)(6) of the Act . . .”). The Supreme Court acknowledged the *ASARCO* ruling in three footnotes with no suggestion of disapproval; the two opinions simply construe different terms in different statutory programs. See *id.* at 841 & n.6, 847 n.17, 857 n.29.

The Supreme Court has long maintained that the NSPS and new source review programs have different purposes, with the NSPS program being technology-forcing, and the new source review program being ambient-air-quality focused. See generally *Env’tl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 565 (2007) (holding court of appeals erred in requiring EPA to conform its regulations under prevention of significant deterioration program, which is closely linked to new source review program, with “their NSPS counterparts”). Those different purposes apply directly when considering the unit at which state-of-the-art control technology must be employed, the question decided for the NSPS program in *ASARCO*.

Moreover, the decisional criteria applied in *ASARCO* are consistent with those that the Supreme Court later employed in *Chevron*: the *ASARCO* court expressly noted that EPA is entitled to deference when interpreting the Act, *ASARCO*, 578 F.2d at 325, and described the court’s role as determining whether an interpretation is “sufficiently reasonable,” *id.* at 326 (internal quotation marks omitted). Indeed, *ASARCO* recites as controlling precedent on this point the very same cases which *Chevron* would later follow. Compare *id.* at 326 nn.21, 22 (citing, *inter alia*, *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976), *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975)), with *Chevron*, 467 U.S. at 843 nn.11, 14 (same).

EPA also argues that it bases its proposed “building blocks” on measures that states are already undertaking. Proposal, 79 Fed. Reg. at 34,856. But a state’s exercise of its own policy discretion cannot confer regulatory authority on a federal agency. And EPA expresses concern that, if it limited its proposal to heat-rate improvements achieved inside the fence at individual coal-fired plants, a “rebound effect” would increase operations at these plants and lead to smaller overall reductions. *Id.* at 34,856 & n.93. But the “rebound effect” is nothing new in environmental law. *See, e.g.*, 75 Fed. Reg. 74,152, 74,316-20 (Nov. 30, 2010) (providing detailed discussion of “rebound effect” in fuel-efficiency context). It has never been used as a justification to set state energy policy or otherwise enlarge EPA’s authority, and it cannot bear that weight here. EPA also asserts that its additional, beyond-the-fenceline “building blocks” promise additional emission reductions “by significant amounts and at lower costs” than some strategies within the first, inside-the-fenceline “building block.” Proposal, 79 Fed. Reg. at 34,856. But even assuming this is true, it is only a reason to propose these measures *if* they are within the agency’s power to propose.

EPA hides behind a fig leaf of federalism and flexibility while in effect forcing major changes to the states’ administration of electricity generation and consumption. But the radical nature of its proposal becomes all the more evident when one considers what will occur if a state does not submit an implementation plan, or if EPA finds a submitted plan unsatisfactory. The agency will then prescribe a *federal* implementation plan for that state, as authorized by 42 U.S.C. § 7411(d)(2). This plan would apply the range of “building blocks” to the state. That is to say, it would set binding emission limits for coal- and gas-fired power plants that would switch the way that sources are allowed to dispatch, set renewable portfolio requirements that would force electric utilities and others to develop renewable resources against their will in order to be allowed to continue operating existing coal-fired assets, and set the same type of efficiency standards for consumers of electricity that the D.C. Circuit recently invalidated when FERC attempted to do so. This total federal invasion of a state power sector would remove all pretext and expose the true extent of this proposal’s violation of state authority. While this would provide clarity, such a catastrophe for federalism is antithetical to the Constitution and cannot be justified under any provision of federal law.

VI. EPA’s Proposal Conflicts with the Federal Power Act

The question of what role the federal government and its agencies should play in developing energy policy throughout the country has been considered extensively under the Federal Power Act, Congress’s definitive pronouncement on the subject. And while Congress unquestionably did not intend Section 111 as an energy-policy provision at all, assuming *arguendo* that it were capable of being construed to touch on energy policy issues in some meaningful way, such as what type of resources may be used to generate electricity in different states, how state and regional power grids should dispatch power, retail energy-efficiency measures, and the like, then EPA’s Section 111(d) proposal directly contravenes Congress’s careful decision in the Federal Power Act to preempt only certain aspects of power generation.

If EPA were allowed to capitalize on Section 111(d) to regulate the electric power sector in some manner other than as individual emission sources, then the section “serve[s] the same function” and “relate[s] to the same thing” as the Federal Power Act, and should be interpreted

together with it. See 2B Sutherland, Statutes & Statutory Construction, § 51:3 (7th ed. 2007) (footnotes omitted) (“Statutes are *in pari materia*—pertain to the same subject matter—when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object.”); see also *Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972) (statutes “intended to serve the same function” are construed together); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-65 (1845) (“The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them . . .”). This interpretive mandate is based on the “assum[ption] that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject.” *Erlenbaugh*, 409 U.S. at 244. It is a “tool of statutory construction [that] allows us to consider all statutes that relate to the same topic; therefore, if a thing in a subsequent statute comes within the reason of a former statute, we transpose the former statute’s meaning to the thing in the subsequent statute.” *United States v. Rodriguez*, 60 F.3d 193, 196 (5th Cir. 1995) (citing *Freeman*).

EPA argues it can use Section 111(d) to address these issues because Congress did not expressly constrain it from doing so. But “[w]here a problem of interpretation was apparently not foreseen by Congress, it is appropriate to consult and be guided by those areas covering the same subject where the expression of legislative intent is clear.” *U.S. v. Stauffer Chem. Co.*, 684 F.2d 1174, 1187 (6th Cir. 1982). In the Federal Power Act, Congress’s intent was clear: it expressly delineated federal and state jurisdiction over the electric industry. In this regard, the Federal Power Act carefully limits federal authority over the sale of electricity to the transmission and sale at wholesale of electric energy in interstate commerce while expressly disclaiming authority over other matters, such as the generation and local distribution and transmission of electricity, which are reserved for their traditional state regulators:

The provisions of this subchapter [*i.e.*, subchapter II of the Federal Power Act] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but except as provided in paragraph (2) shall not apply to any other sale of electric energy* or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, *but shall not have jurisdiction*, except as specifically provided in this subchapter and subchapter III of this chapter [*i.e.*, Licensees and public utilities: Procedural and administrative provisions], *over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce*, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

16 U.S.C. § 824(b)(1) (emphases added).³⁴

It defies belief to suggest that Congress established as a background principle in the Federal Power Act that federal authority over intrastate energy production, transmission, and distribution (both in itself and through the corresponding subject of electricity sales) was precluded unless specifically provided elsewhere, only to *sub silentio* grant EPA authority under Section 111(d) of the Clean Air Act to address all these aspects of that industry without establishing any delineation of federal and state jurisdiction. *Cf. Boumediene v. Bush*, 553 U.S. 723, 777 (2008) (“If Congress had envisioned [Detainee Treatment Act] review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner.”) (noting absence of savings clause in that Act). If Congress had intended to grant EPA regulatory authority under Section 111(d) to address, as such, states’ energy-generation and energy-efficiency policies, it “would not have drafted [Section 111] in th[e] manner” that it did. Instead, it would have laid out a scheme of bifurcated jurisdiction similar to the one it designed in the Federal Power Act. Its total omission of such a scheme shows that it had no such intent.

Congress made a conscious decision in the Federal Power Act not to regulate the generation and distribution of retail electricity precisely because “[t]he FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power but also the regulation of wholesale sales that had been *previously subject* to state regulation.” *New York v. FERC*, 535 U.S. 1, 21 (2002). In other words, even when Congress was unambiguously invading traditional areas of state regulation, it was careful to limit the extent of the invasion through a savings provision. “[A]ware of [that] previous statute[,],” *Erlenbaugh*, 409 U.S. at 244, Congress in subsequently enacting the Clean Air Act surely did not expand another agency’s regulatory purview over those areas without limit. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (“[T]his Court has repeatedly ‘decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.’”) (second alteration in original) (quoting *United States v. Locke*, 529 U.S. 89, 106 (2000)). The situation here is precisely the opposite. If, in light of EPA’s assertion of authority to address all aspects of the power sector under Section 111, we do *not* read that section in light of the Federal Power Act’s savings clause, we “upset the careful regulatory scheme established by federal law.” *See, e.g., Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm’n*, 346 F.3d 851, 864 n.17 (distinguishing *Locke* where statute in question addresses area that “[p]rior to that time . . . was largely regulated by the states”).

³⁴ *See also id.* 16 U.S.C. § 824(a) (“It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*”) (emphasis added).

The appropriate response when an agency so brazenly reaches beyond its delegated authority is the one given by the court in *CAISO*. There, FERC argued that its statutory authority to address “‘practice[s] . . . affecting [a] rate’” gave it authority to address “the composition of the governing board of a utility and the method of its selection.” 372 F.3d at 399 (second and third alterations in original) (quoting 16 U.S.C. § 824e(a)). The agency relied on the breadth of the statutory term “practice,” and “apparently would have [the court] hold that the existence of an ‘infinitude’ of practices supposes that there is also an infinitude of acceptable definitions for what constitutes a ‘practice’ to give it the authority *to regulate anything done by or connected with* a regulated utility We are not biting.” *Id.* at 401 (emphasis added) (quoting *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985)). The court struck down the agency’s interpretation at *Chevron* step one, *id.* at 400, 401.

After concluding that FERC impermissibly stretched the statutory term “practice,” the court confirmed its conclusion by considering “the implications of FERC’s amorphous defining of the term.” *Id.* at 402. “Were we to uphold this theory, the implications would be staggering.” *Id.* at 403. But “we really need reach no . . . parade of horrors,” because

[t]he very act attempted by FERC in this case is quite enough to reveal the drastic implications of its overreaching. . . . Congress has created in Title 15 of the United States Code a Securities and Exchange Commission with extensive powers over corporate regulation. Every state has statutes affecting corporate governance. Presumably the members of the federal and state commissions charged with securities and corporate regulation are chosen with an eye to their expertise in matters corporate. Certainly the legislative bodies have given them powers with a view to that subject matter. The same cannot be said of the legislative empowerment of FERC, nor presumably are its members chosen principally for their expertise in corporate structure.

Id. at 404. The same applies here. Congress created in the Federal Power Act a scheme of extensive (but *carefully delineated*) federal regulatory authority over the energy sector. And the states, of course, have their own statutory and regulatory systems that address those aspects of their energy sectors that Congress has reserved to their jurisdiction. EPA’s legislative empowerment to regulate pollution emissions from stationary sources cannot plausibly be read to cut across this complex scheme of federal and state regulation.

To confirm that EPA is regulating in an area over which it lacks the requisite “legislative empowerment” and “expertise,” one need only look at the reaction to its proposal. Multiple state and federal regulators and stakeholders have expressed grave concern that the proposal—especially because it lacks any formal cooperation with and input from FERC—threatens grave impacts on the reliability and affordability of the nation’s energy supply, particularly in its ability to respond to demand spikes in response to extreme weather events. EPA’s proposal requires states to undergo significant shifts in energy policy, but Congress never intended EPA to be an energy regulator. Congress’s wisdom in that regard is evident from the serious risks posed by EPA’s attempt to act in that area without the necessary authorization and experience.

Taking at face value EPA's baseless assertion that Section 111 empowers it to address a state's energy sector as such, basic principles of statutory interpretation require us to evaluate that assertion in light of the Federal Power Act. But where that Act establishes federal authority over the energy sector, it does so with express, detailed attention to demarcating federal and state jurisdiction. The absence from Section 111 of any such attention confirms that EPA's assertion of authority is not correct.

VII. Conclusion

EPA's proposal violates both the letter and the spirit of the Clean Air Act. It violates the "literal" terms of the Clean Air Act, as EPA has itself conceded. Mem. at 26. It has not been promulgated after the adoption of lawful new source rules under Section 111(b). It departs from statutory authority and regulatory tradition to set energy policy for the states. It departs from the appropriate system of "cooperative federalism" by relegating states to an administrative role in place of their proper substantive one. It treats states as nothing more than giant sources of carbon dioxide emissions. It requires states not only to regulate inside-the-fenceline improvements, but also to make sweeping changes to substantially all aspects of their power sectors. It does all this in the face of an explicit statutory prohibition.

This proposal threatens the states' core interests, the proper functioning of their resource and energy policies, and the very federal structure of our government. The commenting states have an obligation to their citizens to vigorously resist this unlawful proposal. EPA should immediately withdraw the proposal, and if it does not do so, EPA should at the very least ensure that any final Section 111(d) regulations are otherwise stayed until all judicial challenges to those regulations are concluded.

Respectfully,

A handwritten signature in black ink, appearing to read "E. Scott Pruitt", written over a large, stylized circular flourish.

E. SCOTT PRUITT
Oklahoma Attorney General



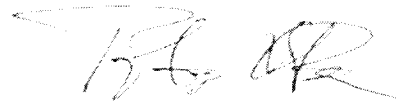
Patrick Morrisey
West Virginia Attorney General




James D. "Buddy" Caldwell
Louisiana Attorney General



Jon Bruning
Nebraska Attorney General



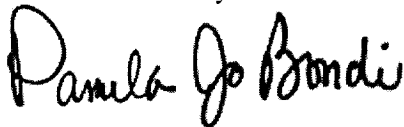
Tim Fox
Montana Attorney General



Luther Strange
Alabama Attorney General



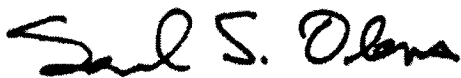
Wayne Stenehjem
North Dakota Attorney General



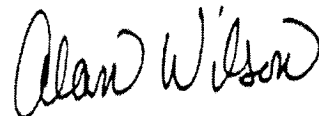
Pam Bondi
Florida Attorney General




Mike DeWine
Ohio Attorney General



Sam Olens
Georgia Attorney General



Alan Wilson
South Carolina Attorney General



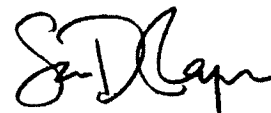
Greg Zoeller
Indiana Attorney General



Marty Jackley
South Dakota Attorney General



Derek Schmidt
Kansas Attorney General



Sean Reyes
Utah Attorney General

A handwritten signature in black ink, reading "Bill Schuette". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Bill Schuette
Michigan Attorney General

A handwritten signature in black ink, reading "Peter K. Michael". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Peter K. Michael
Wyoming Attorney General



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21
OKLAHOMA CITY, OK 73105

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

FIRST CLASS MAIL





BILL SCHUETTE

2/24/17

Dear Scott-

I was supposed to have said a few words tonight about you. But the advance work got messed up. I had worked on my remarks. They were to have been like this:

"Scott Pruitt is a big leaguer, a major leaguer. Pres. Trump hit a home run when he nominated Scott. Scott's drive and intellect will stand out. Scott Pruitt will be the Cy Young award winner of the Trump Administration. I wrote an editorial for the Detroit News and the headline was "Hire Scott Pruitt to stop EPA overreach" Donald Trump made a great hire."

So congratulations. Gritches and I are delighted for you. An honor to have served with you. Best, Bill



BILL SCHUETTE, Attorney General
Department of Attorney General
P.O. Box 30212
Lansing, MI 48909

GRAND RAPIDS MI 49501

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FCL 20363389



MAR 19 2017

Howards E. Port

Environmental Protection Agency
Office of the Administrator 1101A
1200 Pennsylvania Ave NW
Washington DC 20460

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WASHINGTON DC 20460
OFFICE OF THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY
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GRAND RAPIDS MI 49501



BILL SCHUETTE

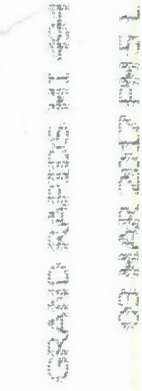
2/24/17

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Answered Jan 19/19

Environmental Protection Agency
Office of the Administrator 1101A
1200 Pennsylvania Ave NW
Washington DC 20460

FCL 20363389

[illegible]

AGLS

EPA 0076

December 19, 2016

Donald J. Trump Presidential Transition Team
1717 Pennsylvania Ave
Washington, DC 20006
Attn: Governor Michael Pence, Vice President-Elect

Re: The Waters of the United States Rule

Dear Vice President-Elect Pence:

We wish to draw your attention to the legal challenge currently pending before the Sixth Circuit Court of Appeals regarding the "Clean Water Rule: Definition of Waters of the United States" (WOTUS Rule) promulgated by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) in June 2015. See 80 Fed. Reg. 37,054–37,127 (June 29, 2015). The WOTUS Rule greatly expands federal jurisdiction beyond the bounds of the Clean Water Act and is one of the Obama Administration's most ambitious expansions of federal power. We urge the incoming administration to rescind the rule and work with the states and Congress to enact legislation that will provide greater clarity and certainty regarding the scope of federal jurisdiction under the Clean Water Act while preserving the authority of state and local governments to manage their own lands and water resources.

The Sixth Circuit has issued a nationwide stay preventing the WOTUS Rule from going into effect, finding that the parties challenging the rule "have demonstrated a substantial possibility of success on the merits of their claims" because "it is far from clear that the new Rule's distance limitations are harmonious with the [Supreme Court's] instruction" and "the rulemaking process by which the distance limitations were adopted is facially suspect." *In re E.P.A.*, 803 F.3d 804, 807 (6th Cir. 2015). The Court further remarked that "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being." *Id.* at 808. Similarly, the United States District Court for the District of North Dakota granted a preliminary injunction against implementation of the WOTUS Rule, finding that the state challengers had a substantial likelihood of succeeding on the merits and would suffer irreparable harm both to their sovereign authority to manage their lands and to their concrete financial and administrative interests. *North Dakota v. E.P.A.*, 127 F.Supp.3d 1047 (D. N.D. 2015). The North Dakota litigation is stayed, and the Sixth Circuit action is currently being briefed.

We strongly urge the incoming administration to rescind the rule and work with Congress to expeditiously enact legislation that solves a problem 45 years in the making. As interpreted by federal regulatory agencies, the phrase "waters of the United States" has defied precise meaning since the Clean Water Act's enactment in 1972, and

has been expanded by the current administration to include virtually any occasionally wet area in the country. Twice in the past 15 years, the U.S. Supreme Court has had to rein in EPA and the Corps for attempting to regulate waters with no appreciable connection to commercially navigable waters, the touchstone of federal jurisdiction. See *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. Corps*, 531 U.S. 159 (2001). As we have noted in our briefing to the Sixth Circuit, agency overreach if left unchecked could have the unfortunate further effect of undermining the structure of the Clean Water Act itself, which Justice Kennedy recently opined can “raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.” *Corps v. Hawkes, Co.*, 136 S. Ct. 1807, 1817 (2016) (Kennedy, J., concurring). It is time for Congress to revisit the “waters of the United States” definition and rein in the regulatory reach of the federal government over land and water resources that are best managed by state and local governments. We ask the incoming Administration to provide much-needed leadership in this critical area, and to make this a legislative priority for the new administration.

We also ask the new administration to consider strategies for addressing the Sixth Circuit litigation immediately upon taking office. Significant state resources will be consumed having to continue to litigate a rule that clearly violates federal law. Those strategies might include seeking a stay of the litigation or agreeing to a voluntary remand while the new administration considers its regulatory and litigation alternatives, as long as the WOTUS Rule remains inoperative nationwide. This may also be a topic the landing teams want to raise with the current administration, as there is no reason to proceed with the litigation if the new administration agrees to revisit the rule immediately after taking office.

The expanded federal jurisdiction imposed by the WOTUS Rule comes at the direct expense of states—which under the regime the current Administration seeks to impose will be forced to cede exclusive jurisdiction over the majority of their waters. Such action exceeds Congress’s statutory authority in enacting the Clean Water Act under the Commerce Clause and infringes upon the states’ rights under the Tenth Amendment of the Constitution. States and their governmental subdivisions down to cities and counties will also be harmed by the increased burdens placed on them as they develop, build, and maintain important infrastructure projects, such as bridges, roads, sewers, and water supply lines. Further, the new regulation—if allowed to stand—will have a significant impact on agricultural, homebuilding, oil and gas, and mining operators as they try to navigate between established state regulatory programs and the new burdensome and conflicting federal requirements. This uncertainty especially threatens those states that rely on revenues from commercial development to fund a wide variety of state programs for the benefit of their respective citizens.

We therefore ask that you plan formal administrative action consistent with the Administrative Procedure Act and the Clean Water Act to withdraw the WOTUS Rule,

and we look forward to working with the new administration to develop a sensible and lasting legislative solution to this long-standing problem. We would appreciate an opportunity to speak with you or a designee about the pending litigation, the WOTUS Rule, and potential legislative solutions. To arrange a meeting with the states, please have your staff contact North Dakota Attorney General Wayne Stenehjem at (701) 328-2210, Eric Murphy in the Ohio Attorney General's Office at (614) 995-2273, Misha Tseytlin in the Wisconsin Department of Justice at (608) 267-9323, or Elbert Lin in the West Virginia Attorney General's Office at (304) 558-2021.

Best regards,



Wayne Stenehjem
Attorney General North Dakota



Mike DeWine
Ohio Attorney General



Patrick Morrissey
West Virginia Attorney General



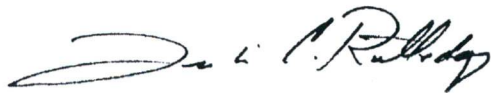
Brad D. Schimel
Wisconsin Attorney General



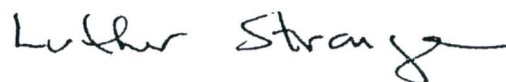
Tim Fox
Montana Attorney General



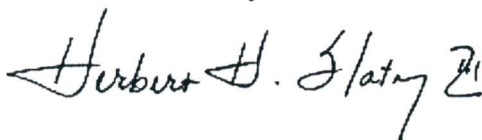
Peter K. Michael
Wyoming Attorney General



Leslie Rutledge
Arkansas Attorney General



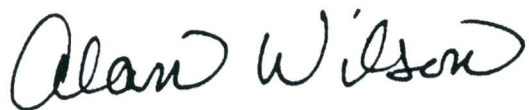
Luther Strange
Alabama Attorney General



Herbert H. Slatery III
Tennessee Attorney General



Gregory F. Zoeller
Indiana Attorney General



Alan Wilson
South Carolina Attorney General



Douglas J. Peterson
Nebraska Attorney General



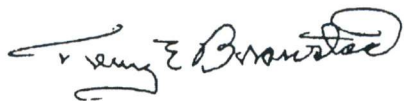
Sean D. Reyes
Utah Attorney General



Jahna Lindemuth
Alaska Attorney General



Ken Paxton
Texas Attorney General



Terry Branstad
Governor of Iowa



Bill Schuette
Michigan Attorney General




Mark Brnovich
Arizona Attorney General



Jeff Landry
Louisiana Attorney General



Derek Schmidt
Kansas Attorney General



Lawrence Wasden
Idaho Attorney General



Marty J. Jackley
South Dakota Attorney General



Adam Laxalt
Nevada Attorney General



Chris Koster
Missouri Attorney General

A handwritten signature in dark ink, appearing to read "Donald R. van der Vaart". The signature is fluid and cursive, with a large initial "D" and "V".

Donald R. van der Vaart
Secretary, North Carolina Department of
Environmental Quality

A handwritten signature in dark ink, appearing to read "Christopher M. Carr". The signature is cursive and somewhat stylized, with a large initial "C".

Christopher M. Carr
Georgia Attorney General

A handwritten signature in dark ink, appearing to read "Cynthia H. Coffman". The signature is cursive and somewhat stylized, with a large initial "C".

Cynthia H. Coffman
Colorado Attorney General

Attorney General

Wayne Stenehjem
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State of North Dakota

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Donald J. Trump Presidential Transition Team
Attn: Governor Michael Pence, Vice
President-Elect
1717 Pennsylvania Ave
Washington, DC 20006

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JAN 07 2017



BILL SCHUETTE
ATTORNEY GENERAL
STATE OF MICHIGAN

July 12, 2017

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EXECUTIVE SECRETARIAT

E. Scott Pruitt, Administrator
Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Pruitt:

Congratulations on your appointment. I have always admired your work as Attorney General of Oklahoma, particularly in regard to agriculture and the environment - two topics my state also takes pride and care in protecting. I am confident you will lead the Agency well.

As President Trump and you work to assemble your team, I ask that you consider Andrew Kok for the position of Assistant Administrator of Water or, secondarily, Assistant Administrator of Air and Radiation. Like you, I believe we need to reform the U.S. Environmental Protection Agency, an agency allowed gross oversteps by the Obama Administration. Mr. Kok has not only the credentials, but the experience and vision to reign in these abuses.

Andrew Kok graduated from the University of Michigan Law School in 1991. He currently serves as General Counsel to the Michigan Farm Bureau and has more than 25 years' experience representing the agribusiness community in challenging inappropriate and unlawful regulations related to the Clean Water Act, Clean Air Act, Superfund, wetlands, and hazardous waste regulatory matters.

Andrew Kok is the right choice for Assistant Administrator of Water. I respectfully ask that you consider his appointment in your movement to halt the regulatory governmental overreach that staggers our nation's economic success.

Sincerely,

Bill Schuette
Attorney General

Andrew Kok
A Farm Bureau
guy.

WDS/bb

BILL SCHUETTE
ATTORNEY GENERAL
525 W. Ottawa Street
P.O. Box 30212
Lansing, Michigan 48909

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E Scott Pruitt, Administrator
Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460



FCL 2059209

ETD-SSB 20460





December 9, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

By electronic submission through www.regulations.gov

RE: Request to U.S. EPA to extend the public comment period in its *Proposed Determination on the Appropriateness of the Model Year 2022–2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation* (Docket ID No. EPA-HQ-OAR-2015–0827).

Dear Administrator McCarthy:

As the chief law officers for the States of Ohio and Michigan, we respectfully request that the federal Environmental Protection Agency grant all interested parties at least a full 90-day comment period in which to evaluate your *Proposed Determination on the Appropriateness of the Model Year 2022–2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation*, 81 Fed. Reg. 87927 (Dec. 6, 2016). As your Agency notes, this Proposed Determination on future vehicle fuel efficiency standards, should it proceed, will have the effect of adding appreciably to the costs that consumers pay for the vehicles they prefer: Even EPA's own "updated analysis shows that the average per vehicle cost to meet the MY2025 standards in MY2025 ... is \$875." The Proposed Determination also is advanced as resting on a complex record that merits careful public examination. We therefore respectfully request that the Agency extend the public comment period at least to March 15, 2017.

Fuel efficiency standards are of great significance to citizens of our States and across this country. The EPA claims substantial benefits from the standards, and the costs will have an effect on particular jobs not only in automobile manufacturing but also in related industries as well as on consumers who may prefer, say, light trucks to electric cars. The general public, consumers, public officials, affected industries, environmental groups, and others all should have appropriate time to weigh the costs and claimed benefits of this program in light of the best and most recent information available. Critics say that your standards "mandate that auto makers mass produce electric cars regardless of consumer demand," to quote one newspaper

editorial, that purchasers of various cars and light trucks will be forced to subsidize those electric cars, and that the standards may sacrifice safety considerations. Concerned observers should be permitted sufficient time to examine these and other allegations and any contrary or countervailing arguments.

As you know, stakeholders envisioned EPA issuing its determination by April 1, 2018. Now, only weeks before a change in Administrations – a change that EPA reportedly denies has anything to do with the new timing and inappropriately short comment period – EPA has hugely accelerated its Midterm Evaluation and allowed a mere 24 days from the date of Federal Register notice in which to comment. Such a truncated comment period defies fair process, common sense, and any notion of procedural regularity given the regulatory process that had informed this matter to this point. This abbreviation of the period for public study and comment will severely impair the thorough, accurate, and fair public assessment required for the National Program and to which EPA committed in 2012.

Besides an unreasonably shortened comment period, EPA's premature Midterm Evaluation would seem to abrogate any claimed spirit of cooperation forged with the domestic and foreign automotive industry on these standards going back to May 2009. The White House's May 19, 2009 announcement declared, "A national policy on fuel economy standards and greenhouse gas emissions is welcomed by the auto manufacturers because it provides regulatory certainty and predictability and includes flexibilities that will significantly reduce the cost of compliance." That announcement was quickly followed by the EPA/DOT *Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions and CAFE Standards*, 74 Fed. Reg. 24007-02 (May 22, 2009). In fact, after the litigation in *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), certain auto manufacturers and associations predicated their support of the National Program on the procedural certainty announced in 2012. See *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, 77 Fed. Reg. 62624-01, 62787 (Oct. 15, 2012).

EPA and NHTSA promised that the Midterm Evaluation would be exhaustive, inclusive, and open. *Notice of Availability of Midterm Evaluation Draft Technical Assessment Report for Model Year 2022–2025 Light Duty Vehicle GHG Emissions and CAFE Standards*, 81 Fed. Reg. 49217-01, 49219 (July 27, 2016) ("The MTE is a collaborative, data driven, and transparent process that will be a holistic assessment of all of factors considered in standards setting, and the expected impact of those factors on manufacturers' ability to comply," citing the 2012 rule at 77 Fed. Reg. 62784). Given the National Program's sweeping impact, the industry understandably sought assurances of procedural certainty. Fed. Reg. at 62787.

Similarly, environmental advocacy groups wanted the Midterm Evaluation to “be conducted as close as possible to the beginning of MY2022 so that the mid-term evaluation could most accurately capture the status of technology and the vehicle market for those model years under review.” *Id.* Yet the accelerated Proposed Determination and the current 24-day comment period, lacking all procedural regularity, afford the opposite of an “exhaustive and inclusive” process.

EPA has acknowledged that the Midterm Evaluation must be a “collaborative, robust and transparent process.” *Id.* at 62633. The information gathered is supposed to be “up-to-date.” *Id.* And the process was to be designed to consider the impacts of that information “on the manufacturers’ ability to comply.” *Id.* Now, those objectives appear forgotten. 24 days cannot possibly account for changed assumptions from the 2012 rule—relating, for example, to the pace of technology development and deployment, revised efficiency projections, altered market conditions, changing fuel and repair costs, co-benefits of non-automotive CO₂ reducing technology, affordability, unrealized expectations, inaccurate modeling, payback period, and countless other economic and consumer issues—that must be considered in commenting on the Proposed Determination. All of these and many other considerations require substantially more time for fair assessment.

Accordingly, we respectfully request that EPA extend the Proposed Determination comment period to March 15, 2017, at the very earliest. Thank you for considering this request.

Very respectfully yours,



Mike DeWine
Ohio Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215



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Michigan Attorney General
G. Mennen Williams Building, 7th Floor
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